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JAMES H. McKENN

IN THE

Supreme Court of the United States.

October Term, 1912.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY,
Plaintiff in Error,
vs.
SALLIE C. WULF,
Defendant in Error.

No. 3

ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR

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MISSOURI, KANSAS & TEXAS RAILWAY COMPANY,
PLAINTIFF IN ERROR,
vs.
SALLIE C. WULF,
DEFENDANT IN ERROR.
No.——

ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR

Since the original brief in this case was prepared, the Supreme Court has decided a case which settles one of the questions involved, and we prepare this supplemental brief that the attention of the Court may be directed to it.

The case to which we refer is American Railroad Company of Porto Rico vs. Birch, 224 U. S. 547. There the plaintiffs, respectively the widow and the son, and the only heirs, of the deceased, brought suit in the District Court of the United States for Porto Rico to recover damages resulting from the death of Francisco Abraham Birch, who was killed while in the service of the defendant. They sued in their individual capacities. There was no administration upon the estate of the deceased, and no necessity for any unless by reason of

the death claim. In the amended petition, upon which the case was tried, the cause of action was expressly based upon the Act of Congress entitled, "An Act relating to the Liability of Common Carriers by Railroad to their employes in certain cases," approved April 22, 1908, which is the statute that governs the cause of action, if any, of the present defendant in error. The defendant contended that the plaintiffs could not recover in the capacity in which they sued. This contention was overruled by the trial court, but sustained by the Supreme Court.

In passing on and overruling a motion of the defendant to direct a verdict for it upon the ground that the suit was not brought by any person authorized under the Federal Employer's Liability Act to bring it, the trial court said:

> "The suit being brought under the Act of Congress of April 22, 1908, it is properly brought in the name of the only persons for whose benefit any recovery could be had, and it is the opinion of the court that the words used in Section 2 of the Act in question, 'to his or her personal representative,' cannot be construed to mean that it is necessary, in cases where only the husband or wife could inherit and are the only survivors, that they be forced, in the absence of any estate belonging to the deceased other than his right to sue, to have an administrator appointed."

In reply to this the Supreme Court said:

> "But the words of the Act will not yield to such a liberal construction. They are too clear to be other than strictly followed. They give an action for damages to the person injured, or, 'in case of his death * * * to his or her personal representative.' It is true that the recovery of the damages is not for the benefit of the estate

of the deceased, but for the benefit of the surviving widow or husband and children.'

"But this distinction between the parties to sue and the parties to be benefited by the suit makes clear the purposes of Congress. To this purpose we must yield. Even if we could say, as we cannot, that it is not a better provision than to give the cause of action to those in relation to the deceased. In the present case it looks like a useless circumlocution to require an administration upon the deceased's estate, but in many cases it might be much the simpler plan and keep the controversy free from elements but those which relate to the cause of action. But we may presume that all contending considerations were taken into account and the purpose of Congress expressed in the language it used."

That holding is conclusive of this question. True, the Birch case arose under the second section of the Act, while this one is controlled by the first section. But the language of the two sections, insofar as this point is concerned, is identical, and if the beneficiaries have no right to sue under the second section, neither can they maintain a suit under the first.

It follows that the defendant in error had no right of recovery in her individual capacity. Her original petition, therefore, failed to state a case, and her rights must be determined as of the date when she sued as administratrix, or as personal representative of the deceased.

The filing of the petition in which defendant in error sued as administratrix was, in effect, the institution of a new suit, and when that petition was filed more than two years had elapsed since the cause of action accrued. For the reasons stated in our original brief, therefore, the claim was barred

by limitation and the plea of limitation should have been sustained.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1912.

Number 517

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY.
Plaintiff in Error
vs.
SALLIE C. WULF
Defendant in Error.

ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR DEFENDANT IN ERROR ON THE MERITS

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1912.

Number 517

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY.
Plaintiff in Error
vs.
SALLIE C. WULF
Defendant in Error.

ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR DEFENDANT IN ERROR ON THE MERITS

EXPLANATION

We call the court's attention to the brief of defend-

ant in error on her motion to dismiss or affirm filed during the October Term 1911. Practically all the issues involved in the suit as now presented are discussed therein. A brief on the merits is a misnomer, because as the case now stands, if the court takes jurisdiction there is nothing for it to determine except as to whether the trial court erred in reference to its action on the question of parties plaintiff. This brief will necessarily cover the same points raised in the brief on motion to dismiss or affirm, with statement of some additional authorities and a review of some of the authorities cited by plaintiff in error in its brief.

The statement of the nature and result of the suit and the issues involved are set forth fully in our brief on motion to dismiss or affirm, and we deem it unnecessary to re-state it here, further than that we may call the court's attention to certain portions thereof in connection with the brief of argument; and in addition thereto, as a predicate for argument, we here make

A BRIEF STATEMENT OF THE PERTINENT FACTS.

On the 27th. of November, A. D. 1908, Fred S. Wulf was killed in Kansas by the explosion of a locomotive while acting as fireman of the plaintiff in error while hauling a train from Parsons, Kansas to Osage, Oklahoma, leaving no wife, children or father surviv-

ing him, Sallie C. Wulf, the defendant in error, his mother, being the sole person for whose benefit a right of action accrued by reason of his death.

On January 23, 1909, Sallie C. Wulf filed suit in her individual capacity, as sole beneficiary, in the Circuit Court of the United States for the Eastern District at Sherman, for the recovery of damages for his death. Her original petition disclosed facts which if established, would authorize a recovery either under the Federal Employer's Liability Act or under the statutes of Kansas. (Rec. 2-4)

On May 19, 1909, plaintiff in error filed its answer consisting of a general demurrer, a special demurrer to the effect that the petition was too vague, general and indefinite, a general denial and a special plea of contributory negligence and assumed risk. These demurrers were never presented to the court for its action thereon. (Rec. 4-5)

On January 6, 1911, plaintiff in error filed its first amended answer consisting of a general demurrer, a special demurrer to the amount of damages claimed, that the cause of action was not governed by the laws of Kansas, that the cause of action arose under the Federal Employer's Liability Act and that the suit could only be brought by a personal representative; a general denial and special plea of contributory negligence

and assumed risk. Said demurrers were never presented to the court for its action thereon. (Rec. 9 - 11)

On the same date, towit: January 6., 1911, defendant in error filed a motion to allow her to prosecute the suit as personal representative as well as in her individual capacity, which motion on said date was granted. (Rec. 15 --16)

On the same date, towit: Jan. 6, 1911, defendant in error filed her amended petition in which she sued as personal representative of the deceased, as well as in her individual capacity, as sole beneficiary. (Rec. 5-8)

On the 9th. day of January, 1911, plaintiff in error filed its second amended original answer, containing the same demurrers as set forth in its first amended original answer, and in addition thereto that the personal representative was made a party to the suit more than two years after the death of the decedent and the right of action was barred under the terms of the Federal Employer's Liability Act, and also plead limitation in its answer to the merits. (Rec. 11-14). The demurrers were by the court overruled. (Rec. 78-79).

A verdict and judgment was rendered in behalf of defendant in error for Seven Thousand Dollars. (Rec. 18) which was affirmed by the Circuit Court of Appeals for the Fifth Circuit. (Rec. 80).

The court will bear in mind that the plaintiff in error only briefed two assignments of error, towit:

1 Because the court refused to instruct the jury to find a verdict for the defendant.

2 Because the court overruled defendant's exception to plaintiff's amended original petition raising the question of limitation.

As the only theory upon which the defendant in error could have insisted on a peremptory verdict was that of limitation, which had already been passed on by the court in overruling the demurrer, both assignments of error refer solely to the question of limitation.

So that, the issues before the court are:

(a) Whether the defendant in error could maintain this suitt in her individual capacity as sole beneficiary when no objection was made by proper pleading *in limine*,

(b) Whether objection can be made to the bringing of this suit in the individual capacity of the sole beneficiary after the plaintiff in error had filed its answer to the merits, and

(c) If so, whether the trial court was authorized to allow her to make herself party plaintiff as personal representative; and, as ancillary thereto, whether or not the making of herself as party plaintiff as personal representative was the beginning of a new suit or

related back to the date of the filing of the original petition.

We will discuss them in their order:

I

The defendant in error being the sole beneficiary of whatever amount that might be recovered in this suit, was the proper party plaintiff in her individual capacity, because the court looks to the real and not the nominal party.

The Supreme Court of the United States has announced from time to time that it looks to the real, rather than to the nominal party. It has uniformly refused to deny substantial justice on technical grounds arising as to the proper parties plaintiff. If the parties at interest are parties to the suit so that their rights can be protected, this court looks no further. It metes out justice.

The Federal Employer's Liability Act (Sec. 1, Ch. 149 of the act of April 22, 1908) as applied to the facts of this case, reads:

> "That every common carrier by railroad while engaged in commerce between any of the several states * * * * * * shall be liable in damages to any person suffering injury while he is employed by

> such carrier in such commerce, or in case of death of such employe, to his personal representative *for the benefits of such employe's parents,*" (Sallie C. Wulf.) (Italics ours.)

By virtue of that statute the central figure is the beneficiary. Without a beneficiary no action would lie. A general demurrer to a petition which fails to show that there is a beneficiary and who it is, would be sustained. The personal representative is a nominal party, only a vehicle to convey the money from the railway company to the beneficiary; the personal representative is the trustee; Sallie C. Wulf is the cestui que trust. There is no sound reason why the cestui que trust, laboring under no legal disability, could not sue in her own behalf and eliminate the trustee. Such has always been the rule under our Texas practice, and of this court. It cannot be contended for a moment but that the judgment obtained by the beneficiary in her own behalf would bar any suit in her behalf by personal representative.

We call the court's attention to the case of Stewart v. B. & O. Ry. Co., 168 U. S. 448, (42 L. Ed. 539). It is set out on page 41 of our brief on motion to dismiss or affirm, but we here quote a portion of it for the convenience of the court. The court will remember that this case involved the issues of parties in a suit brought in the courts of the District of Columbia for a wrong-

ful death that occurred in the State of Maryland over the conflict of the statutes of the two jurisdictions as to who were proper parties plaintiff. Mr. Justice Brewer rendering the opinion cogently says:

> "What are the differences between the two statutes? As heretofore noticed, the substantial purpose of these various statutes is to do away with the obstacle to recovery caused by the death of the party injured. Both statutes in the case at bar disclose that purpose. By each the death of the party injured ceases to relieve the wrongdoer from liability for damages caused by the death and this is its main purpose and effect. The two statutes differ as to the party in whose name the suit is to be brought. In Maryland the plaintiff is the State; in this district, the personal representative of the deceased. But neither the state in the one case nor the personal representative in the other has any pecuniary interest in the recovery. Each is simply a nominal plaintiff. While in the district the nominal plaintiff is the personal representative of the deceased, the damages recovered do not become part of the assets of the estate, or liable for the debts of the deceased, but are distributed among certain of his heirs. By neither statute is there any thought of increasing the volume of the deceased's estate, but in each it is the award to certain prescribed heirs of the damages resulting to them from taking away of their relative.
>
> For the purpose of jurisdiction in the Federal courts regard is had to the real rather than to the nominal party. Brown v. Strode, 9 U. S. 5 Cranch

303 (3:108); McNutt v. Bland, 43 U. S. 2 How. 9 (11:159); State of Maryland, for use of Markley, v. Baldwin, 112 U. S. 490, (28:822). See also Gaither v. Farmers' & Mechanics' Bank of Georgetown, 26 U. S. 1 Pet. 37, (7:43, 45), in which the issue submitted to the jury was, as stated, one between the bank to the use of Thomas Corcorran, plaintiff, and Gaither, the defendant, upon which the court said: 'This practice is familiar with the Maryland courts, and when the action originates in that form, the *cestui que use* is regarded as the real party to the suit.' It is true those were actions on contract, and this is an action for tort, but still in such an action it is evident that the real party in interest is not the nominal plaintiff but the party for whose benefit the recovery is sought; and the courts of either jurisdiction will see that the damages awarded pass to such party."

It seems to us that if that enunciation of the Supreme Court means anything it is that you only look to the real party at interest and not to the nominal one; the material point is whether the beneficiary will get the money.

See also on the same proposition:

Van Doren v. Pa. R. Co., 93 *Fed.* 261.

McDonald v. Nebraska, 101 *Fed.* 171.

Both of these cases by the Circuit Court of Appeals.

What purpose would be subserved by the defend-

ant in error recovering this money in her representative capacity and then delivering the same to herself in her individual capacity we are unable to comprehend.

We are aware of the opinion of this court rendered on May 13th, 1912, in the case of American Railroad Company of Porto Rico v. Ann Elizabeth Birch et al, reported in Advance sheets of the United States Supreme Court, October term 1911, No. 14, page 603, in which the court held that if the question of parties is raised at the proper time, that the personal representative should be made the party plaintiff, in place of the beneficiary. In that case the point that the personal representative instead of the beneficiary should bring the suit seems to have been made and presented at the proper time and acted on by the trial court. We take it that a party defendant always has the right to require the suit to be prosecuted in the name of the proper party if it will call the court's attention to it by proper pleading in due time. However, in that case the court say that the provisions of a former law in Porto Rico gives the Employer's Liability Act "special force." That case is not in conflict with the Stewart case and does not hold that the beneficiary could not have prosecuted the suit in her individual capacity as beneficiary if defendant had not made objection thereto by proper pleading at the proper time.

In the case at bar the plaintiff in error filed its answer to the merits and never raised the issue of proper parties until nearly two years thereafter; more than two years after the death of decedent.

But we are anticipating our next proposition, which is:

2

By filing its answer to the merits, plaintiff in error admitted the capacity of defendant in error to prosecute the suit in her individual capacity.

Section 914 of the United States Revised Statutes provides:

> "The practice, pleadings and forms and modes of proceedings in civil causes other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice pleadings and forms and modes of proceedings existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, any rule of the court to the contrary notwithstanding."

This case was tried in Texas and the pleadings were drawn in the name and form prescribed by the Texas Statutes and Rules of Pleading.

The Texas Revised Statutes lay down a definite

rule governing the pleadings as to plaintiff's legal capacity to sue, as follows:

> "Article 1265. An answer setting up any of the following matters, unless the truth of the pleadings appear of record, shall be verified by affidavit,
>
> 2. That the plaintiff has not legal capacity to sue.
>
> 3. That the plaintiff is not entitled to recover in the capacity in which he sues."

There is not a line of pleadings under oath or otherwise on the part of defendant objecting to the legal capacity of the plaintiff to maintain this suit, until nearly two years after it had plead to the merits. When it filed its answer of general denial and its special pleas of contributory negligence and assumed risk, it thereby waived all defects of parties plaintiff.

Carey v. Brown, 92 *U. S.* 171 (23 *L. Ed.* 469)
Greenleaf v. Queen, 1 *Pet.* 138 7 *L. Ed.* 85.
Connor v. Hawkins, 64 *Tex.* 545.
State v. Goodnight, 70 *Tex.* 688.
Tyron v. Butler, 9 *Tex.* 553.
Blum v. Strong, 71 *Tex.* 329.

31 Cyc. 172, states the proposition broadly that: "A plea to the merits admits plaintiff's capacity to sue."

The original answer of plaintiff in error which

contained no objection to parties plaintiff was filed on May 19, 1909 (Rec. 4-5) Its first pleading that raised the question of proper parties plaintiff was filed on January 6, 1911. (Rec 9-10). The deceased was killed on the 27th day of November, 1908. (Rec. 2). It will be observed that the plaintiff in error was not interested in the question of parties plaintiff until more than two years after decedent was killed.

Plaintiff in error contends that its demurrers raised the question of proper parties. The record discloses that no demurrers were presented for the action of the court until after plaintiff in error had filed its second amended original answer on January 9, 1911.

Besides, under the Texas rules of pleading a general demurrer does not raise the question of parties plaintiff.

Rule 17 for the government of district courts reads:

> "General exceptions shall point out the particular instrument in the pleadings, to-wit, the original petition or answer, or the respective supplements to either; and in passing upon such general exception every reasonable intendment arising upon the pleading excepted to shall be indulged in favor of its sufficiency."

Here is defendant's general demurrer in its original answer:

> "Defendant demurs to plaintiff's petition because the facts therein show no cause of action."

Now, bearing in mind that any objection to parties plaintiff must be plead specially, there isn't the slightest hint in that demurrer that the suit is not brought by the proper party.

A special demurrer does not raise the question of improper parties unless it plainly says so.

Rule 18 for the government of the district courts reads as follows:

> "A special exception shall not only point out the particular pleading excepted to, but it shall also point out intelligibly the obscurity, inconsistency, duplicity, generality or other insufficiency in the allegations in the pleading objected to. The general expression that it is vague, uncertain, and the like, alone, shall be regarded as no more than a general exception."

The special demurrer of plaintiff in error in its original answer is as follows:

> "First, it is too general, vague and indefinite."

Judged by the rule above, the special demurrer was a nullity.

As said by Chief Justice Gaines in the case of State v. Goodnight, 70 Tex., at page 688:

"A plea in abatement should not only show the grounds upon which the suit should be abated, but should also give the plaintiff a better writ—that is it should not only show that the suit is improperly brought, but also how it should have been brought. The plea in this case says that others are interested in parts of the fences, but, does not allege in what parts each have an interest, nor does it state the nature of that interest. A pleading should always state the facts and not conclusion of law, and a plea in abatement, which sets up a non-joinder of parties defendant should show definitely and specifically the nature and extent of the interest of each person, who is claimed to be a necessary party."

In the case of St. Louis, S. F. & T. Ry. Co. v. Seale et al., decided by the Texas Court of Civil Appeals for the Fifth District, reported in Vol. 148 S. W. Rep. 1099, suit was brought under the Texas Statutes for wrongful death by the beneficiaries in their individual capacities. The pleadings of neither party disclosed any facts that would invoke the application of the Federal Employer's Liability Act. The railway company presented a general demurrer and a special exception, to the effect that the original petition did not disclose whether or not the suit was brought under the Federal Employer's Liability Act, which were overruled by the trial court. After the trial court had delivered its charge to the jury, the railway company presented a special charge asking a peremptory verdict in its be-

half, on the ground that the cause of action arose under the Federal Employer's Liability Act and the suit was not brought in the name of the legal (personal) representative of the deceased. The appellate courts held that it could not take advanage of the want of proper parties plaintiff withont specially pleading the same in the lower court, and affirmed the case. Writ of error was denied by the Texas Supreme Court on October 16th, 1912, which refusal, under our practice, approves the decision of the court of Civil Appeals.

To the effect that a general demurrer does not raise the question of proper parties, see also:

Williams v. Bradburg, 9 *Tex.* 487.
Shelby v. Burtis, 18 Tex. 644.
Ry. v. Lockhart, 141 S. W. 128.

A similar statute of Louisiana has been so construed by the United States Circuit Court of Appeals for the Fifth Circuit in the case of T. & P. Ry. Co. v. Lacy, 185 Fed. 227, wherein the court say:

> "Garland's Rev. Code of Practice of Louisiana, Art. 327. An exception, which if sustained would result in the dismissal of the suit, should be pleaded *in limine litis*. Legendre v. Seligman, Hellman & Co. 25 La. Ann. 113. See also Adams & Co. v. Coons, 37 La. Ann. 305; Heirs of Mason

v. Layton, 38 La. Ann. 675. If there were not statutes or local decisions to sustain the view, we would hold, nevertheless, that a defendant would not be permitted to successfully urge the alleged defect in this court after entering a general denial and trying the case on the merits in the lower court and having failed to suggest the alleged defect in that court."

The same court in T. & P. Ry. Co. v Jackson, 193, Fed. 949, state the doctrine as follows:

> "A defendant cannot be permitted to plead to the merits and go to trial, and, after all the evidence is in, avail himself of a defect in the petition which could have been cured by amendment if pointed out by an exception. Where the alleged defect in the petition relates to the plaintiffs' capacity to sue, to take advantage of such defect, it must be pleaded before issue joined. When a defendant intends to resist an action by means of exception to the right of the plaintiffs to sue, he must plead it expressly in his answer. He is not permitted to avail himself of it after the trial on the merits. These rules are based on the reasonable presumption that if such defect exists as matter of fact, it would be pleaded *in limine*."

Not by the remotest suggestion could the exceptions contained in the original answer be considered as raising the question of proper parties plaintiff. Furthermore as said before, plaintiff in error never presented such exceptions to the court for action and never filed any exceptions objecting to the question of

proper parties until more than two years after the cause of action had accrued, and nearly two years after it had filed its original answer to the merits.

We call the court's attention to the further facts that plaintiff in error did not ask nor obtain permission of the court to withdraw its answer to the merits for the purpose of filing an exception to parties plaintiff, which was in the nature of a plea in abatement. The trial court was authorized to permit it to do so, under the discretion granted it under Sec. 954, United States Revised Statutes. (Eberly v. Moore, 24 How. 147, a case that went up from Texas.)

3

The trial court was authorized to permit the defendant in error to make herself party plaintiff as administratrix, and the same was not the beginning of a new cause of action, but related back to the beginning of the suit; and such action of the court is not subject to review.

Before discussing the merits of this proposition, we call the court's attention to the fact that the defendant in error filed a motion on January 6th., 1911, asking the court for permission to allow her to prosecute said suit as personal representative. (Rec. 15).

The court on the same date granted said motion allowing defendant to prosecute the suit as party plaintiff as personal representative of deceased. (Rec. 17.)

Plaintiff in error took no exception to the court entering said order, and does not assign or brief said action of the court as error, but relies solely upon the overruling of the court of its demurrer filed on Jan. 9th 1911, raising the question of limitation. Therefore we contend that plaintiff in error cannot now take advantage of the action of the court in permitting the defendant in error to make herself party plaintiff as personal representative.

In the event, only, that the court shall overrule us in this contention, then we say that

By virtue of Section 954 of the United States Revised Statutes, the trial court is allowed the fullest discretion in making amendments. This section is quoted on page 48 of our brief on motion to dismiss or affirm and will not be re-quoted.

A leading case under this statute is one by the Circuit Court of Appeals for the Eighth Circuit: McDonald v. Nebraska, 101 Fed . 171. The suit was originally brought by the treasurer of the State of Nebraska to recover money, and afterwards the State

moved to have the State itself made party plaintiff to comply with the statute of the state of Nebraska which provided that the State should be plaintiff in suits of that character, which being permitted by the court, the defendant claimed that it was the beginning of a new cause of action and that limitation had barred the same. The Circuit Court of Appeals held that it was not the beginning of a new cause of action, but that the amendment as to parties took effect as of the date of the filing of the original suit. The opinion of the court in that case is set out at some length in our brief on motion to dismiss or affirm, beginning at page 48 and will not be re-quoted. It was quoted at such length because of the authorities therein reviewed sustaining the opinion.

That case was followed by Van Fleet, District Judge of the Northern District of California in the case of Reardon v. Balakala etc. Co., 193 Fed. 190. That suit was filed under the Statutes of the State of California which required suits for death to be brought in the name of the legal representative of deceased. The beneficiary erroneously brought the action in his own name instead of as that of administrator of the deceased, under the mistaken opinion that the case fell within another section of the California Statute. Afterward the plaintiff was allowed by the

court to amend and make himself party as personal representative of the deceased. If the amendment was the beginning of a new suit, the action was barred by limitation. The court said:

> "It is again strenuously insisted that such a change in the sole party plaintiff is not the proper subject of an amendment, that, in effect, the action of the court was to allow, under the guise of an amendment, a new action to be brought in the name of the administrator after the time had elapsed in which he could originally maintain it; and, as the amendment has relation to the commencement of the action, it will, if sustained, have the effect to deprive defendants of the right to interpose the plea of the statute, which as claimed, had ripened into a bar when the amendment was allowed. In another form the objection is, that, the right of action being in its inception purely statutory and given exclusively to the legal representative ,the bringing of the action in the name of the father was wholly nugatory and ineffectual to arrest the running of the statute; and to allow the substitution now is in legal effect to extend the statutory limitation for bringing the action by the administrator. This position is pressed with such ingenuity as to make it plausible, but I do not regard it as sound. As indicated in granting the leave, it involves an erroneous conception of the legal effect of the omission sought to be corrected, and a too narrow construction of the purpose and effect of the statutes, both state and federal (C. C. P. Sec. 473; R. S. Sec. 954 (U. S. Comp. St. 1901, p. 696). in providing the extent and character of relief that may

be afforded by way of amendment, to avoid mistakes of the nature of that here involved. It should be borne in mind, as then stated, that the substantive cause of action counted on in the amended complaint has not been changed. It remains precisely the same as that stated in the original pleading. No new facts are alleged as a ground of recovery, the only change being in the name of the plaintiff and the capacity in which he sues; while the father still remains the beneficiary of the recovery sought. This being so, the change effected by the amendment is obviously in no just sense the bringing of a new action. It is one of form rather than of substance, and in the interests of justice is to be treated as such, rather than to adopt a view which would result in an irretrievable bar to all remedy. Under the modern doctrine, the discretionary power of the court to such end is to be liberally exerted in favor of, rather than against, the disposition of a case upon its merits; and I am entirely satisfied after further examination of the question induced by the argument that, under the broad and comprehensive terms of section 954, if not as well under the statute of the state, the defect involved is one which may be cured by amendment. It will not be necessary in support of this conclusion to discuss the many authorities referred to in the briefs and will be sufficient, I think, to refer to some later cases not cited by counsel, which have fallen under my observation, and which to my mind very fully cover every phase of the question." (Referring to the case of McDonald v. Nebraska, 101 Fed. 171.)

In the case of Day v. Chism, 10 Wheat. 449 (6

L. Ed. 663) the parties plaintiff brought suit as devisees and heirs, and were permitted to amend and show in what capacity they did claim.

Under this proposition with varying degrees of pertinency, see also:

Viscount etc. v. S. P. Co. 176 *Fed.* 843.

Lower v. Segal, 59 N. J. Law 66 (34 Atl. 945)

Chapman v. Barney, 129 *U. S.* 677 (32 *La. Ed.* 800.)

Albany v. Lundberg, 121 *U. S.* 451 (30 *Law Ed.* 984)

T. & P. Ry. Co. v. Cox, 115 *U. S.* 593 (36 *L. Ed.* 833)

Richmond v. Iron, etc. 121 *U. S.* 27 (30 *U. S.* 854)

Ry. v. Davis 30 *S. W.* (*Tex.* 694.

Martel v. Somers, 26 *Tex.* 558.

Price v. Wiley, 19 *Tex.* 142.

Rabb v. Rogers, 67 *Tex.* 339.

Hudson v. Morris. 55 *Tex.* 604.

Smith v. Anderson, 39 *Tex.* 498

Walker v. Howard, 34 *Tex.* 508

Hamlin v. Baxter, 20 *Kan.* 136.

The discretion of the trial court in allowing such amendments as granted by Section 954 of the United States Revised Statutes is plenary and cannot be reviewed.

In the case of Eberly v. Moore, 24 How, 147 (16 L. Ed. 614) the doctrine is clearly stated as follows:

> "The plaintiffs object to the authority of the district court to permit the withdrawal of pleas in bar, for the purpose of pleading to the jurisdiction; that a plea in bar admits the jurisdiction of the court, and the capacity of the plaintiffs to sue, and that they cannot be deprived of the benefit of that admission. The equitable jurisdiction of courts of the United States as courts of law is chiefly exercised in the amendment of pleadings and proceedings in the court, and in the supervision of all the various steps in a cause, so that the rules and practice of the court shall be so administered and enforced as to prevent hardship and injustice, and that the merits of the cause may be fairly tried. Such a jurisdiction is essential to and is inherent in the organization of courts of justice. Bartholomew v. Carter, 3 M. & G. 125 But this jurisdiction has been conferred upon the courts of the United States in a plenary form by acts of Congress. 1 Stat. at L. p. 83, Sec. 17; p. 335, Sec. 7, p. 91. Sec. 32.
>
> It has been uniformly held in this court that a circuit court could not be controlled in the exercise of the discretion thus conceded to it. Spencer v. Lapsley, 20 How. 264."

In the case of Spencer v. Lapsley, 20 How 264 (15 L. Ed. 964) the right of the trial court to refuse

the filing of a plea in abatement after long delay, the court say:

> "This court has decided that such applications are addressed to the judicial discretion of the inferior court, and its decision is not open for revision here. It has decided that the refusal of an inferior court to allow a plea to be amended, or a new plea to be filed, or to grant a new trial or a continuance, or to reinstate a cause which has been legally dismissed, cannot be questioned for error in this court."

See also to the same effect:

In Re Glass, 119 *Fed.* 509.

Union Cent. Life Ins. Co. v. Phillips. 102 *Fed.* 23.

While later on we will show that the amendment as to parties was permissable and proper under the Texas state practice; yet the right of the Circuit Courts of the United States to allow such amendments without review by the appellate courts, independent of any state statute where said court is sitting, is fully established by the following authorities:

Mexican Central R. Co. v. Duthie, 189 *U. S.* 76.

Bramberger v. Terry, 103 *U. S.* 43.

Erstein v. Rothschild, 22 *Fed.* 61.

Bowden v. Burnham, 59 *Fed.* 752.

Olliver v. Raymond. 108 *Fed.* 927.

U. S. Bank v. Lyon, 48 *Fed.* 632.

Referring to the U. S. Rev. Stat, Sec. 914 which provides, in substance, that the practice of the state courts, so far as the same can be done, shall be followed by the United States courts sitting in said state, we quote the Texas Revised Statutes:

> "Article 1188: All parties to a suit may in vacation amend his pleadings, may file suggestions of death and make representative parties and make new parties and file such other pleas with the clerk of the court in which suit is pending as they may desire."
>
> "Article 1190: Whenever a judgment has been arrested or a new trial granted because of the insufficiency of the pleadings of the party in whose favor the judgment was rendered, the court may allow such pleadings to be amended as if no such trial had been had or judgment rendered."

Rule 12 prescribed by the Texas Supreme Court for the government of district courts provides as follows:

> "An amendment may be made by either party, upon leave of the court for that purpose, or in vacation, as prescribed by statute; the object of an amendment, as contradistinguished from a supplemental petition or answer, being to add something to, or withdraw something from, that which has been previously pleaded, so as to perfect that which is or may be deficient, or to correct that which has been incorrectly stated by the party making the amendment."

In addition to the Texas authorities under this proposition set out on pages 64-65 of our brief on motion to dismiss or affirm, we refer the court to the case of Laughlin v. Tips 28 S. W. 551, where the plaintiff was authorized to amend and make an omitted member of the firm party to the suit, which the court held not to be the filing of a new suit as to such party.

In the case of Frank v. Kaigler, 36 Tex. 305, the court held that a party who sues in the name of another for his own use, when he might have sued in his own name, may amend and proceed in his own name.

In Heard v. Lockett, 20 Tex. 163, the suit was brought by Baldridge for the use of Lockett. The trial court permitted an amendment in which Lockett sued in his own behalf. The Supreme Court held that it was authorized to do so.

In the case of Dowell v. Mills, 32 Tex. 440, Mills brought suit on a note in his own behalf, and afterwards amended and prosecuted the suit for the use of the estate of one Saunders, deceased. The Supreme Court held that the amendment was proper and used this language:

"We do not think it would make much dif-

> ference to defendant who gets the money. He has not denied owing the debt, and as this judgment stands, he can discharge it by paying the estate of the deceased Saunders."

In the case of Schneider-Davis Co. v. Brown, 46 S. W. 109, the court say:

> "Appellants' first assignment complains that the court erred in overruling their exception directed at the plaintiff's first amended original petition, to the effect that the original cause of action was abandoned, and a new cause of action set up which was barred by the statutes of limitation. The court did not err in its ruling. The proposition is based upon the fact the the original pleading did not disclose that plaintiff held the goods as the trustee for the benefit of creditors, while the amended plea fully set forth this fact as the basis of his right of possession. This was not a change in the cause of action."

The case of T. N. O. Ry. Co. v. Berry, 67 Tex. 238, was a suit by the widow of deceased for his wrongful death. There was in existence a child of the widow and deceased who was by the Texas statutes also entitled to sue. The widow sued in her own name and recovered a judgment. The Supreme Court refused to reverse the judgment, because the child was not made a party, holding that, though the widow did not sue for the benefit of the child, yet that the result of the judgment was a recovery for

herself and child. That any objection to the parties should have been made by exception at the proper time.

See also on the substitution of parties (Texas cases):

Massey v. Blake, 21 *S. W.* 782.
Jones v. Blake, 21 *S. W.* 783.
Hinchman v. Marshall, 22 *S. W.* 926.
Tousey v. Butler, 9 *Tex.* 525.
Mayer v. Walker, 82 *Tex.* 222.
Tolbert v. McBride, 75 *Tex.* 95.
Tackett et al. v. Mutual Realty Co., 143 *S. W.* 347.

The latter case holds that where the suit was brought by the stockholders of a corporation individually, the corporation itself could be substituted as party plaintiff and it would not be a new cause of action.

It is also the well settled doctrine of the United States Supreme Court that it will not review the action of a state court on construing questions of pleading and practice in that court. By like reasoning it would not review the United States Circuit Courts in construing same.

In the case of T. & N. O. Ry. Co. v. Miller, 221 U. S. 408 (55 L. Ed. 795) this court held that the

action of the Texas State Courts as to the proper pleading of the statute of limitation was one of practice that would not be reviewed.

Likewise, in the case of Brinkmeier v. M. P. R. Co., reported in advance sheets of the United States Supreme Court, October term 1911, No. 11, page 413, this court held that the refusal of the state court to permit plaintiff to amend and allege a new cause of action on the theory that the new cause of action would be barred by limitation, was a question of practice which it would not review.

So, that whether the United States or the Texas Statutes are invoked, the trial judge was authorized to allow defendant in error to make herself party plaintiff as personal representative, and such action is not subject to review.

We do not deem it necessary to quote the decisions of other states to the effect that a substitution of a new party plaintiff is not the beginning of a new cause of action but takes effect as of the date of the filing of the original suit, because this court could not posssibly harmonize the conflicting decis-

ions of the appellate courts of the different states on this or any other issue, and is not called to do so, as it has held time and again that it does not consider them authority which it should follow. The decisions of the United States Supreme Court and the Texas courts on pleading and practice, insofar as they relate to this case, are conclusive. Yet we quote a few of the decisions of other states in reply to those that are quoted in the brief of plaintiff in error.

Pa. R. Co. v. Sloan, 125 *Ill.* 72.

An amendment to correct a mistake in the name of defendant does not constitute the bringing of a new suit which would be barred if the original cause of action would then be barred if not previously brought.

Sublett v. Hodges, 88 *Ala.* 491:

Amending a complaint to show that plaintiff had become the sole owner of a cause of action originally belonging to him and another jointly does not alter his position under the statute of limitations.

Bray v. Creekmore, 109 *N. C.* 49.

An amendment merely in the name of the plaintiff in an action commenced before the expiration of the statute of limitation does not allow the statute to take effect.

Hines v. Rutherford. 67 *Ga.* 606

A suit brought by one as heir at law may be amended so as to become a suit by him as executor.

Tighe v. Pope, 16 *Hun.* 180.

Leave may properly be granted to amend a summons and complaint by striking out the words "as administratrix" after the defendant's name. Within Code, Sec. 723, this is not introducing a new defendant, or new cause of action.

Numerous other cases could be cited, varying with the peculiar statutes or rules of proceedure of the different states, also dependent somewhat upon the ideas of the various judges as to the liberal or strict construction thereof.

We now come to the proposition as to

Whether or not the original petition disclosed a cause of action under the Federal Employer's Liability Act.

Plaintiff in error contends that the original petition disclosed only a cause of action under the Kansas Statutes, and therefore, that the amended petition of defendant in error was the first to disclose a cause of action under the Federal Employer's Liability Act. This position is absolutely untenable.

For the convenience of the court we will quote the pertinent parts of the original petition:

"The United States of America. In the Circuit Court of the United States, for the Eastern District of Texas, at Sherman. May term, A. D. 1909. To the Honorable Judge of Said Court: Sallie C. Wulf, hereinafter styled plaintiff, complaining of the Missouri, Kansas & Texas Railway Company, hereinafter styled defendant, represents that plaintiff is a bona fide inhabitant, resident and citizen of Grayson county, Texas, and that defendant is a corporation, duly incorporated and organized under the laws of the state of Kansas; that defendant has various lines of railway within the state of Kansas and Texas, including the county of Labatte in the state of Kansas and the county of Grayson in the state of Texas; that George Stoner is local agent of said said defendant, representing it in Grayson County, Texas.

For cause of action, plaintiff represents that heretofore, towit: On the 27th. day of November, A. D. 1908, Fred S. Wulf was in the employment of the defendant, in the capacity of fireman on its locomotives. That on said date he was in the due performance of his duties as such fireman on train No. 433, locomotive No. 488, bound from Parsons, in the state of Kansas to Osage in the state of Oklahoma.

That when said train had proceeded about four miles upon its route, and while it was in Labatte county, Kansas, without fault or negligence upon the part of the said Fred S. Wulf, the locomotive drawing said train, upon which the

said Fred S. Wulf was riding, suddenly exploded, blew up and gave way, thereby burning and scalding the the said Fred S. Wulf, and throwing him with great force and violence from said locomotive a distance of about a hundred feet upon the ground and right-of-way there situate, so cruelly wounding, burning, bruising and mangling him as to cause his immediate death." (Rec. 1-2)

Then follows an allegation that his death was caused by reason of the defective locomotive upon which he was riding; then his age and earning capacity and ends as follows:

"Plaintiff is the mother of the said Fred S. Wulf, and is a feme sole: and the said Fred S. Wulf was an unmarried man, leaving no wife nor children surviving. That his father died prior to the time he died, and plaintiff is the sole heir, next of kin, and beneficiary of the estate of the said Fred S. Wulf, deceased. That there is no administration pending on the estate of the said Fred S. Wulf, within this state or elsewhere, and that none is necessary. That said decedent was a resident citizen of the state of Texas when he was killed, but was temporarily working in Kansas.

That by virtue of the laws of the state of Kansas, where the said Fred S. Wulf was killed, a right of action is provided by statute, for injuries resulting in death. That the said Fred S. Wulf contributed all of his earnings to the support of plaintiff at the time of his death, and would have continued to have contributed his said earnings to plaintiff's support during the

remainder of his life and the life of plaintiff. That plaintiff has a reasonable prospect of living forty years longer.

That by reason of the premises, plaintiff has been damaged in actual damages in the sum of forty thousand ($40,000.00) dollars. Wherefore, plaintiff sues, and prays that defendant be cited to answer this petition, and upon final trial she have judgment for her damages and costs of suit." (Rec. 3-4)

There can be no doubt but that the original petition disclosed a cause of action under both the Federal Employer's Liability Act and under the Statute of Kansas. The amended petition in which plaintiff sues as personal representative is in the exact language of the original petition, with the following additions:

After the venue and residence, the following paragraph is inserted:

"Plaintiff represents that she is the sole heir and next of kin of the hereinafter named Fred S. Wulf, deceased, and that at the time of the filing of the original petition herein there was no administration upon the estate of the said Fred S. Wulf, deceased, and no necessity for any. That on the 4th. day of January A. D. 1911, she was duly appointed temporary administratrix of the estate of the said Fred S. Wulf, deceased, by the county court of Grayson county, Texas, a court of competent jurisdiction, and qualified as such and is now acting as such, with full power and

authority to prosecute this suit as party plaintiff, and has made application to be appointed permanent administratrix at the ensuing term of said Probate Court for said purpose. That there now exists no necessity for an administration upon the estate of the said Fred S. Wulf deceased, unless the same should be necessary for the sole purpose of prosecuting this suit as administratrix of said decedent for the benefit of herself as the surviving parent and next of kin of the said decedent; said plaintiff being the next of kin and sole beneficiary of whatever may be recovered in this suit. She therefore sues in her original capacity as such sole beneficiary and next of kin, but in the event that it shall be determined that she is not entitled to recover in said capacity, then she asks that she be allowed to recover as administratrix for her benefit as aforesaid. Therefore she sues both in her individual capacity and as administratrix as aforesaid." (Rec.5-6)

And then after the allegation as to the relationship of the plaintiff, etc. the following clause is inserted:

"That by virtue of both the laws of the State of Kansas, where the said Fred S. Wulf was killed, and the Acts of Congress of the United States of America, a right of action is provided for injuries resulting in death in the manner and form and in the occupation that deceased was engaged in at the time of his death." (Rec. 8)

Likewise, by virtue of the amended petition,

there was a cause of action declared on, both under the Federal Employer's Liability Act and the statutes of Kansas.

The allegations in the petition that a right of action accrued under the Federal Employer's Liability Act and that it accrued under the Statute of Kansas were conclusions of the pleader and were surpulsage. Under the system of pleading in Texas, the facts, and not the conclusions, must be set out in the petition.

Rule 2 prescribed by the Supreme Court of Texas for the government of district courts is as follows:

> "Pleadings, with the exception of those presenting issues of law, must be a statement of facts, in contradistinction to a statement of evidence of legal conclusions, and arguments."
>
> *Connor v. Hawkins*, 64 *Tex.* 545.
>
> *State v. Goodnight*, 70 *Tex.* 688.
>
> *Tyron v. Butler*, 9 *Tex.* 553.

So that, when the original petition set up "For cause of action" plaintiff represents that heretofore, to-wit: on the 27th. day of November, A. D. 1908, Fred S. Wulf was in the employment of the defendant, in the capacity of fireman on its locomotives. That on said date he was in the due performance of his duties as such fireman, on train No. 433, locomotive No. 488, *bound from Parsons in the State of Kansas to*

Osage in the State of Oklahoma" that a statement of facts is alleged which clearly indicated, without equivocation or doubt, that the deceased and the plaintiff in error were engaged in interstate commerce at the time and in reference to the matter in which deceased lost his life.

The defendant in error was authorized in its original petition to present as many causes of action as it deemed necessary to meet the facts that might be introduced on the trial, as the suit was based only upon one transaction.

Dobbins v. Bryan, 5 *Tex.* 276.

Mateer v. Cockrill, 45 *S. W.* 751

Craddock v. Goodwin, 54 *Tex.* 582.

In the latter case the court say:

> "The objection of multifariousness is not favored; it is entitled to no liberality of construction. And we believe that the many matters complained of in this suit may, without inconvenience or injury, be settled in it. They all spring out of the same transaction, and there would seem to be no necessity of more than one suit about them."

That the conclusions of the pleader as to what law prevailed, might be disregarded as surplusage under our Texas practice without effecting the substance of the pleading, see:

Nash v. George, 6 *Tex.* 234.
Turner v. Brooks, 6 *Tex.* 205.
Maddox v. Craig, 80 *Tex.* 600.
Kottwitz v. Bagby, 16 *Tex.* 656.
In the latter case the court say:

> "In our practice if the plendings contain averments which are not material and essential, these, unless they occasion repugnancy or inconsistency, may be treated as mere surplusage."

In Burns, Guardian, v. Goff, 79 Tex. 236, the court say:

> "A variance between pleadings and proof cannot be based on averments which are merely surplusage."

It was proper, under the Texas practice, to plead facts disclosing a right of action under the Federal Employer's Liability Act and also under the Kansas Statutes. When the facts disclosed that the Federal Employer's Liability Act governed the right of action, the allegation under the Kansas Statute could be treated as surplusage. In like manner, if the facts should disclose a right of action under the Kansas Statutes, the allegations as to interstate commerce should be treated as surplusage.

While plaintiff in error, in portions of its brief contends that the original petition does not disclose a cause of action under the Federal Employer's Liability Act, in other portions of its brief it admits that

the original petition disclosed that the deceased and plaintiff in error were engaged in interstate commerce at the time and about the matter in which deceased was killed, but undertakes to avoid that allegation upon the theory that no suit was filed under the Federal Employer's Liability Act until the filing of the first amended original petition, because the original suit was not brought

IN THE NAME OF THE PERSONAL REPRESENTATIVE

and therefore limitation had barred the right of action. This contention is absolutely untenable and calls for a construction of the Federal Employer's Liability Act that is not only antagonistic to its benevolent object, but is directly in the face of the decisions of this court on the construction of such legislation.

In the case of Stewart v. B. & O. Ry. Co., 168 U. S. 447 (42 L. Ed. 538) (heretofore referred to in this brief), after reviewing the decisions presented in that case contending that where the provision of liability is coupled with the provision for a special remedy, that that special remedy must alone be employed, in reference to statutes allowing cause of action for death, says:

> "The purpose of the several statutes passed in the states, in more or less conformity to what

> is known as Lord Campbell's act, is to provide the means for recovering the damages caused by that which is essentially and in its nature a tort. Such statutes are not penal, but remedial *for the benefit of the persons injured by the death.*" (Italics ours.)

So far as we have been able to determine, the liberal rule for the construction of statutes giving a right of action for wrongful death by this court has never been in any manner overruled or modified.

As said in Caspar v. Lewin, 109 Pac, 665, in passing upon an act for the protection of employes in mills in the State of Kansas,

> "The statute was manifestly intended for the protection of life and to prevent the mangling of human bodies."

A similar holding was promulgated by Judge Taft in the case of Narramore v. Cleveland etc. R. R., 96 Fed. 298, wherein he was construing the effect of a statute that required the switches of railroads in its yards to be blocked.

Again, the report of the Judiciary Committee of the House of Representatives, when the Federal Employer's Liability Act was under consideration, contains this potential language:

> "In considering the advisability of amending the Act entitled 'An act relating to the liability of common carriers by railroads to their em-

ployes in certain cases,' approved April 22, 1908, it is important at the outset to understand that the purpose of Congress in the passage of this act was *to extend further protection to employes.* (Italics ours.) This was its manifest purpose, as is apparent from a consideration of the circumstances of its enactment. It is manifest from a consideration of the reports, both of the Senate and House committees, when the measure was pending before those bodies prior to its enactment, that the purpose of the statute was *to extend and enlarge the remedy provided by law to employes engaged in interstate commerce in cases of death or injury to such employes while engaged in such service.* (Italics ours.) No purpose or intent on the part Of Congress can be found to limit or take away from such employe any right theretofore existing by which such employes were entitled to a more extended remedy than that conferred upon them by the act." See Thornton's Liability Act. Appendix B., page 420.

Therefore, if it was the intention of Congress to pass a broad and liberal act for the protection of employes and their families, and if as the Supreme Court say, such statutes are enacted for the benefit of employes, then we destroy the very reason for said act when we place a narrow and restricted construction on the same.

We realize that there are some decisions by state courts upholding this narrow construction, but as said

in the English case of Walsh v. Whiteley, L. R. 21 Q. B. Div. 371, there is a conflict among the courts as to how these acts should be construed; some that they should be construed strictly that no injustice may be done to the master, and some that the act had been passed to extend the liability of the master in favor of the workman, and ought to be construed liberally in favor of the workman. On the latter side the English judge places his court.

Again, there is a line of decisions holding that where a statute is passed changing the common law, that it must be construed strictly. Without going into the question of whether the tendency is to abandon such a construction; as said by Justice Brewer in the Stewart case, employees' acts do not come within this class. They do not change the common law, they "merely remove the common law obstacle" to such a recovery.

We will briefly review the citations of plaintiff in error which this court might regard as authority.

The case of U. P. R. Co. v. Wyler, 158 U. S. 285, was one in which a suit for personal injuries was filed in the State court of the State of Missouri upon a cause of action that accrued in the State of Kansas. The action was brought under the common law, alleging the incompetency of the plaintiff's fellow servant.

He afterwards amended and plead the Statute of Kansas which abolished, or modified, the common law doctrine of fellow servant. It was necessary to allege the Statute of Kansas in order to recover under it in the State of Missouri. Mr. Justice White held, properly, we think, that the pleadings introduced a new cause of action; one upon which he could not recover without having plead.

There is no change in the cause of action in the case at bar further than the amendment of parties. The original petition stated facts which showed that the plaintiff in error and deceased were both engaged in interstate commerce at the time deceased lost his life. The amendment did not change the allegation that plaintiff in error and deceased were engaged in interstate commerce at the time deceased lost his life. There was no change in the allegation as to the negligence of plaintiff in error which caused deceased's death. The two pleadings are identical, save and except that in the amendment the defendant in error made herself party plaintiff as personal representative of the deceased, and alleged a right of action under the Federal Employer's Liability Act, a conclusion of the pleader, a surplusage that could not add to or take away from the allegation "that at the time deceased was killed he was in the employment of the defendant as locomotive fireman, bound from the City of Parsons

in the State of Kansas, to the town of Osage in the State of Oklahoma." Hence the Wyler case is not in point.

In the case of Fithian v. Ry. Co., 188 Fed. 843, the district judge of the Western district of Arkansas merely sustained a demurrer setting up the fact that a suit under the Federal Employer's Liability Act could only be maintained by the personal representative of the deceased. The opinion discloses no question of substitution or amendment of parties.

The case of Porto Rico v. Birch, 221 U. S. 547, was one in which the railway company raised the question at the proper time and place by a demurrer in its answer, that the suit should be prosecuted by the personal representative rather than the legal heirs of the deceased. As we understand it, it decided nothing further than that as the statute designates that the personal representative is the proper party plaintiff and the defendant raised the question at the proper time and in the proper manner, it was the duty of the court to require the personal representative to prosecute the suit. Neither does that case pass on the question of substitution of parties or whether the railway company could complain of the failure of the personal representative to be the party plaintiff two years after having answered to

the merits. In fact, we construe the Birch Case as authorizing the substitution of a personal representative as a party plaintiff, in that the case was reversed and remanded without prejudice to such rights as the personal representative may have." We apprehend that when the personal representative makes herself party plaintiff more than two years will have elapsed since the death of the deceased Birch, in fact, that more than two years elapsed between the trial in the lower court and the rendition of the opinion in the Supreme Court; and the court would not have reversed and remanded the case in order to let the personal representative be made party plaintiff if it was going to hold, in the event it reached that court again, that she was barred by limitation; that is, "have her march up the hill and then march down again."

In the case of Texas & Pacific Ry. Co. v. Cox, 145 U. S. 593, cited by plaintiff in error, the court directly held that the amendment in that case was proper, and did not set up a new cause of action.

Likewise in the case of Atlantic etc. R. Co. v. Laird, 164 U. S. 393 (41 L. Ed. 485) the court held that the amendment there was proper and didn't set up a new cause of action in which limitation could be plead.

In fact, there is not a decision of the United States Supreme Court cited by plaintiff in error which can

be taken as authority in enforcing the harsh rule contended for by it in this case.

The Texas cases cited by plaintiff in error upon this issue are just as wide the mark. We will briefly review them:

In the case of McLane v. Pascal, 62 Tex. 102, the court say:

> "It has been too frequently held by this court that an amendment may even set up a new cause of action, subject to certain restrictions, such as payment of costs, to require further discussion of the question; and certainly a defendant may be allowed to plead, by way of amendment, any new matter which will defeat the plaintiff's action."

In the case of Lumber Co. v. Water Co., 94 Tex. 463, the original suit of the plaintiff was brought on a contract. It afterward abandoned the contract and undertook to claim by purchase. Certainly the court properly held that the amendment set up a new cause of action.

The case of McLane v. Belvin et al., 47 Tex. 493, was one in which plaintiff sued on a contract with the executors to pay him a certain amount of money. He afterward amended and sued to recover on a note, payment of which had been made to him in Confederate money through duress, evidently a different cause of action.

In the case of Bigham v. Tolbott, 63 Tex. 271, the suit was filed on a contract alleged to have been made with a certain party. The amendment alleged a contract with another and different party.

In the case of Ry. v. Pape, 73 Tex. 502, the original petition claimed damages to five acres of land that was cut off the main tract of plaintiff by the construction of a railroad. Plaintiff afterward amended and abandoned that suit and declared on damages for failure of the railroad company to construct according to contract, a crossing connecting his two tracts of land.

In the case of Ry. v. Scott, 75 Tex. 84, plaintiff claimed that as part of the consideration of a settlement of his suit for personal injuries that the rail way company had agreed to give him employment as an engineer whenever he should demand it. He obtained a judgment, the case was appealed and reversed, because the contract was too indefinite to be enforced. He then amended and alleged a contract with the railroad to be that he should have employment for his natural life. The court very properly held that this was a different contract from the one declared on in his original petition.

In the case of Cotton v. Rand, 93 Tex. 24, the

plaintiff declared on a contract for compensation as agent for an annual salary. He filed an amendment in which he declared that his agency to the party declared on in the original petition was nominal; that his substantial agency referred to other parties which the court held to be a different cause of action.

The case of Armstrong v. Bean, 59 Tex., 492, was a suit in tresspass to try title filed by A. H. Bean in his own behalf. An amended petition was filed by Cora L. Bean, in which she claimed to be the owner. The court very properly held that the filing of the petition by Cora L. Bean was the beginning of a new suit, she not being a party to the other suit and it not being filed in her behalf or for her use and benefit.

In the case of Ry. v. Howell ,111 S. W. 142, the syllabus seems to indicate that where a suit for wrongful death was brought without joining the widow and minor child, the making of the widow and minor child plaintiff was the beginning of a new suit as to them, but the body of the opinion does not bear it out. The ouly point before the court in reference to that matter was as to whether or not the railway company was entitled to a continuance by reason of the amendment making new parties.

We believe this disposes of all the cases cited by defendant in error from the United States Supreme Court or from the Texas courts on the question as to whether or not the substitution of new parties plaintiff is the introduction of a new cause of action, and we do not find a single one to the effect that where the original suit was brought by the beneficiary that the substitution of a nominal plaintiff, such as personal representative, constitutes a new cause of action against which limitation can be plead.

Plaintiff in error also undertakes to get around the proposition by claiming that the original petition did not state a cause of action under the Federal Employer's Liability Act, because it was necessary to allege and prove that the personal representative was such indeed. That there being no personal representative named in the original petition as party plaintiff, no proof could be introduced. This contention seems to us puerile. There is nothing better established in Texas practice than that unless denied under oath, the plaintiff is presumed to have the right to sue in the capacity in which he does sue.

In Cheatham v. Riddle, 12 Tex. 112, the court after stating what former rules in England were on this proposition, say:

"But these useless distinctions have been abolished in England by the recent rules, and now, in all actions by or against executors or administrators, the character in which the plaintiff sues or the defendant is sued, cannot in any case be considered as in issue, unless specially denied. and it has been held in this country that, unless the plaintiff's right to sue as executor or administrator is put in issue by the defendant's plea, it will be deemed to have been admitted. This rule is convenient in practice, and, it is conceived, is in consonance with principle, especially under our system of pleading, which requires such specialty in pleading as will apprize the adverse party of the matters of fact intended to be relied on in evidence. And the practice is believed to have been not to require the plaintiff to prove his representative character unless it was specially put in issue. The general denial has been understood as putting the plaintiff on proof of the facts which constitute the cause of action, but not the character in which he sues. And no reason is perceived for requiring the plaintiff to prove his representative character, unless it is controverted by the pleading of his adversary."

This has been the universal rule in the Texas courts.

See:

Clifton v. Lilley, 12 *Tex.* 130.

Trammell v. Swan, 25 *Tex.* 473.

Bauman v. Chambers, 91 *Tex.* 108

Manning v. Hunt, 36 *Tex.* 118.

So that if you were to take the original petition and the amended petition and strike out the conclusion of the pleader as to what law prevailed, they would both disclose a right of action under the Federal Employer's Liability Act, the only difference being that in the original petition the suit was filed by the only beneficiary under the same; in the amended petition she makes herself party plaintiff as personal representative to meet the special exception of the plaintiff in error filed at that time. The court permitted her to do that. Its action was in consonance with right and justice, and cannot now be reviewed. Said amendment took effect as of the date of the filing of the original petition and the court properly overruled the plea of limitation.

We respectfully submit that the petition for writ of error is without merit and it should be dismissed; if jurisdiction of same is entertained by the court, then that the same should be affirmed.

JUDSON H. WOOD.

JAMES P. HAVEN.

Attorneys for Sallie C. Wulf, Defendant in Error

15

Supreme Court, U. S.
FILED.
APR 29 1912
JAMES H. McKENNEY,
Clerk.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY,
Plaintiff in Error,
vs.
SALLIE C. WULF,
Defendant in Error.
No. 517

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR PLAINTIFF IN ERROR ON MOTION OF DEFENDANT IN ERROR TO DISMISS OR AFFIRM.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY,
Plaintiff in Error,
vs.
SALLIE C. WULF,
Defendant in Error.
No. 933.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR PLAINTIFF IN ERROR ON MOTION OF DEFENDANT IN ERROR TO DISMISS OR AFFIRM.

STATEMENT.

Fred S. Wulf died November 27, 1908, as the result of injuries received in the explosion of a boiler on one of the locomotives of the plaintiff in error near Parsons, Kansas, November 27, 1908, while engaged as a fireman on said locomotive, which was hauling a freight train from Parsons, in the State of Kansas, to Osage, in the State of Oklahoma.

At the time of the explosion and death, there was in effect the following Act of Congress of the United States, known as the "Employers' Liability Act of 1908":

"An Act relating to the liability of common carriers by railroad to their employes in certain cases.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled; that every common carrier by railroad while engaged in commerce between any of the several States and Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employe, to his or her personal representative, for the benefit of the surviving widow or husband and children of such em-employe; and, if none, then of such employe's parents; and, if none, then of the next of kin dependent upon such employe, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employes of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment.

"Sec. 2. That every common carrier by railroad in the Territories, the District of Columbia, the Panama Canal Zone, or other possessions of the United States, shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or, in case of the death of such employe, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employe; and, if none, then of such employe's parents; and, if none, then of the next of kin de-

pendent upon such employe, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employes of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Sec. 3. That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this Act to recover damages for personal injuries to an employe, or where such injuries have resulted in his death, the fact that the employe may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe. *Provided*, That no such employe who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employe.

"Sec. 4. That in any action brought against any common carrier under or by virtue of any of the provisions of this Act to recover damages for injuries to, or the death of, any of its employes, such employe shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employe.

"Sec. 5. That any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Act, shall to that extent be void: *Provided*, That in any action brought against any such common carrier

under or by virtue of any of the provisions of this Act, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employe or the person entitled thereto on account of the injury or death for which said action was brought.

"Sec. 6. That no action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued.

"Sec. 7. That the term 'common carrier' as used in this Act shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier.

"Sec. 8. That nothing in this Act shall be held to limit the duty or liability of common carriers or to impair the rights of their employes under any other Act or Acts of Congress, or to affect the prosecution of any pending proceeding or right of action under the Act of Congress entitled, 'An Act relating to liability of common carriers in the District of Columbia and Territories, and to common carriers engaged in commerce between the States and between the States and foreign nations to their employes', approved June eleventh, nineteen hundred and six.

"Approved April 22, 1908" (35 U. S. Stat. at L. 65).

The above act was amended April 5, 1910 (36 Stats. 291), by an act entitled:

"An Act to amend an Act entitled 'An Act relating to the liability of common carriers by railroad to their employes in certain cases', approved April twenty-second, nineteen hundred and eight.

"Be it enacted by the Senate and House of Rep-

resentatives of the United States of America in Congress assembled, That an Act entitled 'An Act relating to the liability of common carriers by railroad to their employes in certain cases', approved April twenty-second, nineteen hundred and eight, be amended in section six so that said section shall read:

" 'Sec. 6. That no action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued.

" 'Under this Act an action may be brought in a circuit court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this Act shall be concurrent with that of the courts of the several states, and no case arising under this Act and brought in any state court of competent jurisdiction shall be removed to any court of the United States.'

"Sec. 2. That said Act be further amended by adding the following section as section nine of said Act:

" 'Sec. 9. That any right of action given by this Act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employe, and, if none, then of such employe's parents; and, if none, then of the next of kin dependent upon such employe, but in such cases there shall be only one recovery for the same injury.' "

This Act was passed and approved April 22nd, 1908 —more than six months before the cause of action herein sued upon accrued. This was the only act, either State or Federal, in existence and effect under which a suit could be prosecuted by anyone for the

death of Fred S. Wulf, the pleadings and proofs clearly showing that the plaintiff in error, the Railway Company, was at the time engaged in interstate commerce between two of the several states, and further showing that Fred S. Wulf was, at the time when he sustained the injuries from which he died, employed by the plaintiff in error in such commerce.

Section 1 of the Employers' Liability Act of 1908 expressly provides that in case of the death of such employe the action for damages shall inure to the benefit of "his or her **personal representative,** for the benefit of the surviving widow or husband and children of such employe; and, if none, then of such employe's parents; and, if none, then of the next of kin dependent upon such employe". Section 1 of this Act further provides that "every common carrier by railroad while engaged in commerce between any of the several states" * * * shall be liable "for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employes of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

It is clear, therefore, that under this Act, in case of the death of any employe, the suit inures to and must be, and can only be, brought by the **personal representative,** and not by the surviving widow or husband and children of the deceased, or by his parents, or by his next of kin, or by any one or more of them. The Act not only creates the cause of action, but expressly determines in whom the cause of action vests. And section 6 of the Act expressly provides that no action shall

be maintained thereunder, unless commenced within two years from the day the cause of action accrued.

Notwithstanding the plain provisions of this Act, and notwithstanding the fact that this Court has expressly held that the cause of action given by the Act of Congress in question is exclusive of and supplants all State legislation, Mrs. Sallie C. Wulf, the defendant in error, in her **individual capacity** and claiming to be the mother of Fred S. Wulf, on January 23, 1909, filed suit against the plaintiff in error in the Circuit Court of the United States for the Eastern District of Texas, at Sherman, to recover damages for the death of said Fred S. Wulf on account of his injuries and death under the circumstances above set forth.

At that time and before there had been and were general statutes in Kansas creating and giving a cause of action for injuries resulting in death, which, prior to the passage of the Act of Congress referred to, had been construed as giving a cause of action on account of the injuries and death of employes of railroad companies, whether engaged in intrastate or interstate commerce, as well as for deaths generally resulting from the wrongful acts or omissions of another—much like "Lord Campbell's Act"—those statutes being Sections 6014 and 6015, General Statutes of Kansas, 1909, and being the same as Sections 4871 and 4872, General Statutes of Kansas, 1901, and read:

> "**Action for Death by Wrongful Act; Limitation; Damages.**—When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action had he lived, against the latter for an injury for the same

act or omission. The action must be commenced within two years. The damages cannot exceed ten thousand dollars, and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased.

"**When action may be brought by widow or next of kin.** That in all cases where the residence of the party whose death has been or hereafter shall be caused as set forth in the next preceding section is or has been at the time of his death in any other state or territory, or when, being a resident of this state, no personal representative is or has been appointed, the action provided in said section may be brought by the widow, or where there is no widow, by the next of kin of such deceased."

At the time of the accident and the institution of the suit in question there were also in force in the State of Kansas the following satutes, abrogating the common-law fellow servant doctrine, being Sections 6999 and 7000, General Statutes of Kansas, 1909:

"To employe; notice. Every railroad company organized or doing business in the State of Kansas shall be liable for all damages done to any employe of said company in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employes, to any person sustaining such damage: Provided, That notice in writing that an injury has been sustained, stating the time and place thereof, shall have been given by or on behalf of the person injured, to such railroad company within eight months after the occurrence of the injury. Provided, however, that where an action is commenced by the injured person within said eight months, it shall not be neces-

sary to give said notice. And provided further, that where any person injured is in the hospital of or under the charge of the railroad company causing the injury, or is prevented by the affects of said injury, the said eight months shall not begin to run until such person is discharged from said hospital or care of said railroad company, or until such disability be removed. Provided further, that in case said injured person shall die, as a result of said injuries, within said eight months, it shall not be necessary to give said notice. Provided further, that said notice need not state whether or not suit is intended to be brought.

"Serving of notice. The service mentioned in section 1 hereof may be served by a written copy thereof, by the person injured or anyone on his behalf, upon any person designated by the railroad in any county in which the action might be brought, as provided in Section 4499 of the General Statutes of Kansas of 1901, or if no such perhas been designated or appointed, as in said section provided, then upon any local superintendent of affairs, freight agent, agent to sell tickets, or station keeper of such company or corporation in such county, or such service may be made by leaving a copy thereof at any depot or station of such company or corporation in such county, with the person in charge thereof or in the employ of such company or corporation, and such service shall be held and deemed complete and effectual. Proof of such service shall be made by the affidavit of the party making the same, or other persons knowing the facts."

In her original petition the defendant in error alleged that she was a resident and citizen of Grayson County, Texas, and that the plaintiff in error was "a

corporation duly incorporated and organized under the laws of the State of Kansas"; that it had "various lines of railway in the States of Kansas and Texas, including the County of Labette in the State of Kansas and the County of Grayson in the State of Texas; that George Stoner is local agent of said defendant representing it in Grayson County, Texas". There was no allegation that the plaintiff in error was a citizen and resident of the State of Kansas, nor any allegation as to where its principal place of business was. In this original petition it was specifically alleged that "on the 27th day of November, A. D. 1908, Fred S. Wulf was in the employment of the defendant in the capacity of fireman on its locomotives, and on said date he was in the due performance of his duties as such fireman on train No. 433, locomotive No. 488, bound from Parsons, in the State of Kansas, to Osage, in the State of Oklahoma". It is further alleged that when his train had proceeded about four miles the locomotive suddenly exploded, thereby burning and scalding Fred S. Wulf and throwing him with great force and violence from said locomotive so as to cause his "immediate death".

The following, substantially, are the grounds set forth in the original petition upon which a recovery was sought:

1. The locomotive in question "was old, worn, rusty, out of repair, improperly constructed and unfit for use".

2. The firebox, constituting a part of the boiler, was old worn, burned, crystalized, rusty and thin, so that the same could not stand the steam pressure.

3. That the water gauge and steam gauge were old, worn, stopped up, broken and improperly constructed,

so that they did not register correctly the amount of water and steam in the boiler.

4. The defendant refused to properly inspect the locomotive.

5. That the defendant failed and refused to make the necessary, customary and proper tests, and that all of the defects were known to the defendant, or could have been known by the use of ordinary care, but were unknown to Fred S. Wulf.

It was alleged that Fred S. Wulf was twenty-two years of age, and that the plaintiff, Sallie C. Wulf, "is the mother of said Fred S. Wulf, and is a *femme sole*, and that the said Fred S. Wulf was an unmarried man, leaving no wife or child surviving; that his father died prior to the time he died, and that plaintiff is the sole heir, next of kin and beneficiary of the estate of the said Fred S. Wulf, deceased; **that there is no administration pending on the estate of said Fred S. Wulf within this State or elsewhere, and that none is necessary; that decedent was a resident and citizen of the State of Texas when he was killed,** but was temporarily working in Kansas; **that by virtue of the laws of the State of Kansas, where said Fred S. Wulf was killed, a right of action is provided by statute for injuries resulting in death.**"

It is transparently clear, therefore, that in this petition the plaintiff undertook to state a cause of action under the laws of the State of Kansas, wholly ignoring and claiming no rights under the Federal Employers' Liability Act, but which alone could apply or give a cause of action, if any there was, under the facts set forth in the petition, plaintiff expressly alleging that the deceased was in the employ of the defendant, a common carrier, engaged at the time in inter-

state commerce, and that the deceased himself was so engaged.

It will be observed that under the Kansas statutes, and under the first section quoted, the suit must be brought by the **personal representative,** the same as in the Federal Employers' Liability Act. But under the second section of Kansas statutes quoted, it is provided that where the residence of the party whose death has been caused "is or has been at the time of his death in **any other State** or Territory, or when, being a resident of this State, no personal representative is or has been appointed, the action provided for in said section 422 may be brought by the widow, or where there is no widow, by the next of kin of such deceased."

Plaintiff undoubtedly sought to bring suit under these Kansas statutes, and as provided in second section thereof if suit could have been maintained under these Kansas statutes, it is clear that deceased, having been a **resident of the State of Texas at the time of his death,** it was not necessary that the suit be brought by the personal representative, nor was it necessary to allege that no personal representative "is or has been appointed", as under these statutes this allegation is only necessary where the deceased was a resident of the State of Kansas.

On April 19, 1909, the plaintiff filed its original answer, as follows:

PLAINTIFF IN ERROR'S ORIGINAL ANSWER.

First. Defendant **demurs** generally to plaintiff's petition because the facts therein alleged **show no cause of action.**

Second. Defendant demurs to plaintiff's peti-

tion because; first, it is too general, vague and indefinite.

Third. Defendant for general answer to plaintiff's petition denies every allegation therein contained and demands strict proof thereof.

Fourth. Defendant for special answer to plaintiff's petition says that the injuries complained of, if any such were in fact sustained, were proximately caused and contributed to by deceased's own negligence and want of ordinary care and by that of his fellow servants. That said injuries, if any were received, resulted from one of the risks assumed by deceased. That of the said defects and causes which produced the injuries complained of, if any were produced, the deceased had full notice, or by the exercise of ordinary care on his part, would have had full notice in ample time to have avoided the same.

Wherefore defendant prays to be discharged with its costs (Rec., pp. 4-5).

The first paragraph of this answer which was a general demurrer, clearly raised the issue, that defendant in error, having alleged that the plaintiff in error was a common carrier by railroad engaged in interstate commerce, and that the deceased sustained the injuries from which he died while so engaged, that defendant in error failed to state facts constituting a cause of action, being in effect a general demurrer. This demurrer should have been sustained, because (*a*) no cause of action was or could be stated under the Kansas statutes; (*b*) the facts alleged clearly show that the defendant in error as mother could not sue, in any view of the case, under the Federal Employers' Liability Act; (*c*) facts were not stated in the petition setting forth a cause of action

in anyone under the terms of the Federal Employers' Liability Act, which was exclusive and the only act under which any suit could have been maintained for the death of the deceased.

Thereafter, and on January 6, 1911, plaintiff in error filed its first amended original answer, as follows:

PLAINTIFF IN ERROR'S FIRST AMENDED ORIGINAL ANSWER.

I.

Defendant demurs generally to plaintiff's petition, because the facts therein alleged **show no cause of action.**

II.

Defendant demurs specially to plaintiff's petition, and says that said cause **of action appears to be brought under the statutes of Kansas providing for a recovery of** damages on account of injuries resulting in death and alleges her damages at the sum of $40,000.00, while plaintiff is not permitted, under the laws of Kansas, to recover in excess of $10,000.00 on such a cause of action.

III.

Defendant demurs to the following paragraph in plaintiff's petition specially, to-wit:

> "He (deceased) was a locomotive fireman with the reasonable prospects for promotion to the position of locomotive engineer."

Because the only materiality of such allegation would be on the question of amount of recovery, and on that question the proposition of this promotion depended upon a great many contingen-

cies, and was too speculative to be considered in arriving at the damages sustained by plaintiff.

IV.

It appears from plaintiff's petition that at the time of the injury and death of F. S. Wulf, that defendant was engaged in interstate commerce between the States of Kansas and Oklahoma, and that deceased was in the employ of defendant at the time of his injury and death, and was himself engaged in interstate commerce between said States, and that said cause of action is not governed by the laws of Kansas.

V.

Defendant specially demurs to plaintiff's petition on the ground that it appears from said petition that the cause of action, if any there is, arising from the death of F. S. Wulf, grows out of and depends upon an Act of Congress passed in 1908, known as the Federal Employers' Liability Act, because at the time of the injury and death of F. S. Wulf, defendant was engaged in interstate commerce between the States of Kansas and Oklahoma, and the said F. S. Wulf was in defendant's employ and was himself engaged in such interstate commerce, at the time of his injuries and death, and that such cause of action is governed by said Act of Congress passed in 1908, and arises to the personal representative of F. S. Wulf and not to the plaintiff in this case.

VI.

Defendant for general answer to plaintiff's petition denies every allegation therein contained and demands strict proof. Except that at the time

the said deceased was killed he was engaged in interstate commerce.

VII.

Defendant for special answer to plaintiff's petition says that the injuries complained of, if any such were in fact sustained, were proximately caused and contributed to by deceased's own negligence and want of ordinary care, and of that of his fellow servants; that said injuries, if any were received, resulted from one of the risks assumed by deceased; that of the said defects and causes, which produced the injuries complained of, if any were produced, the deceased had full notice, and by the exercise of ordinary care on his part would have had full notice in ample time to have avoided the same. **That at the time plaintiff was injured he was engaged in interstate traffic.**

Wherefore, defendant prays to be discharged with its costs (Rec., pp. 9-11).

And on the same day, January 6, 1911, **and being more than two years after the cause of action, if any, arose under the Federal Employers' Liability Act**, the defendant in error filed the following motion:

DEFENDANT IN ERROR'S MOTION TO SUBSTITUTE PARTIES.

Now comes the plaintiff in the above-styled and numbered cause, and **represents to the Court that at the time she filed this suit there was no administration upon the estate of the decedent, Fred S. Wulf, and no necessity for any. That since the filing of said suit, to-wit, on the 4th day of January, 1911, the plaintiff had been appointed temporary administratrix of the estate of Fred S. Wulf, deceased,** with full power to prosecute this

suit as personal representative of the said Fred S. Wulf, deceased, and has asked that said administration be made permanent at the next term of the County Court. **THAT UNDER THE LAWS GOVERNING SUCH MATTERS THE PLAINTIFF IS THE SOLE BENEFICIARY OF WHATEVER AMOUNT THAT MAY BE RECOVERED IN THIS SUIT**; that the same constitutes no assets of the estate of the said Fred S. Wulf, deceased, but go directly to plaintiff.

Wherefore, plaintiff moves the Court to allow her to amend and to prosecute this suit to its final termination as the personal representative of the decedent, for her individual benefit as well as in her individual capacity; that there may be no doubt as to the proper party plaintiff to this suit under the law (Rec., p. 63).

Which motion was, by the Court, on said date granted, and the following order entered:

ORDER OF COURT ON MOTION.

On this, the 6th day of January, A. D. 1911, came on to be heard plaintiff's motion to allow her to prosecute this suit as the personal representative of Fred S. Wulf, deceased, as well as in her individual capacity, and the same being considered by the Court, is granted, and plaintiff is authorized to prosecute said suit both in her individual capacity and as personal representative, she being the sole beneficiary of whatever amount is recovered (Rec., p. 64).

To which action of the Court plaintiff in error then and there excepted (Rec., p. 64).

And thereafter, and on the same day, and being more than two years after the cause of action, if any, arose under the Federal Employers' Liability Act, the de-

fendant in error filed her first amended original petition, as follows:

DEFENDANT IN ERROR'S FIRST AMENDED ORIGINAL PETITION.

Now comes the plaintiff, **Sallie C. Wulf,** and after having obtained leave of the Court, files this as **her** first amended original petition, amending **her original petition filed herein January 23, 1909, and for such says:**

That plaintiff is a *bona fide* inhabitant, resident and citizen of Grayson County, Texas, and was such at the time of the filing of this suit, and has so remained ever since. **That defendant is a corporation duly incorporated and organized under the laws of the State of Kansas, and has various lines of railway within the States of Kansas, Oklahoma and Texas, including the County of LaBette** within the State of Kansas, and the County of Grayson, within the State of Texas, and that the defendant has been duly served and filed its answer herein.

Plaintiff represents that she is the **sole heir and next of kin of the hereinafter named Fred S. Wulf,** deceased, and that at the time of the **filing of the original** petition herein there was **no administration upon the estate** of the said Fred S. Wulf, deceased, and no necessity for any. **That on the 4th day of January, A. D. 1911, she was duly appointed temporary administratrix of the estate of the said Fred S. Wulf,** deceased, by the **County Court of Grayson County, Texas,** a court of competent jurisdiction, and qualified as such and is now acting as such, **with full power and authority to prosecute** this suit as a party plaintiff, and has made **application to be appointed permanent administratrix at the ensuing term of said Probate Court for said purpose.** There now exists no necessity for an

administration upon the estate of the said Fred S. Wulf, deceased, unless the same should be necessary for the sole purpose of prosecuting this suit as administratrix of said decedent for the benefit of herself as the surviving parent and next of kin of the said decedent; said plaintiff being the next of kin and sole beneficiary of whatever may be recovered in this suit. She therefore sues in her original capacity as such sole beneficiary and next of kin, but in the event it shall be determined that she is not entitled to recover in said capacity, then she asks to be allowed to recover as administratrix for her benefit as aforesaid. Therefore, she sues both in her individual capacity and as administratrix as aforesaid.

For cause of action, plaintiff represents that heretofore, to-wit, on the 27th day of November, A. D. 1908, Fred S. Wulf was in the employment of the defendant, in the capacity of fireman on its locomotives. That on said date he was in the due performance of his duties as such fireman, on train No. 433, locomotive No. 488, bound from Parsons in the State of Kansas to Osage in the State of Oklahoma. That when said train had proceeded about four miles upon its route and while it was in LaBette County, Kansas, without fault or negligence upon the part of the said Fred S. Wulf, the locomotive drawing said train, upon which the said Fred S. Wulf was riding, suddenly exploded, blew up and gave way, thereby burning and scalding the said Fred S. Wulf, and throwing him with great force and violence from said locomotive, a distance of about a hundred feet upon the ground and right-of-way there situate, so cruelly wounding, bruising and mangling him as to cause his immediate death.

* * * * * * *

That plaintiff is the mother of the said Fred S.

Wulf, and is a femme sole, and that the said Fred S. Wulf was an unmarried man, leaving no wife or children surviving; that his father died prior to the time of his death, and that plaintiff is the sole surviving parent, heir, next of kin and beneficiary of his estate and of the amount recovered herein as hereinbefore alleged.

That said decedent was a resident citizen of the State of Texas when he was killed, but was temporarily residing in the State of Kansas at the time that he met his death, which occurred in said State of Kansas as hereinbefore alleged.

That by virtue of both the laws of the State of Kansas, where the said Fred S. Wulf was killed, and the Acts of Congress of the United States of America, a right of action is provided for injuries resulting in death in the manner and form and in the occupation that deceased was engaged in at the time of his death.

* * * * * * *

That by reason of the premises, plaintiff has been damaged in actual damages in the sum of forty thousand (40,000) dollars.

Wherefore, she sues and defendant having duly answered herein, she prays that she recover her damages and costs of suit (Rec., pp. 5-8).

It will be seen, therefore, that long after two years, being the time fixed within which suit might be brought under the Federal Employers' Liability Act, the plaintiff sought to amend her original petition, which, under no conceivable theory, was amendable, because it wholly failed to state a cause of action, by alleging and setting up a new cause of action and under a Federal statute instead of the Kansas statutes. The Kansas statutes and the Act of Congress are entirely dissimilar, both as to the grounds upon which a

recovery could be had **and as to the parties entitled to sue, as to the amount recoverable** and as to the beneficiaries. Under the Kansas statutes, under the facts set forth, it was not necessary for the suit to be brought by the personal representative, whereas, under the Federal statutes, suit by the personal representative is indispensable. Under the Kansas statutes the damages are **limited to ten thousand dollars**, whereas, under the Federal Statutes damages are unlimited and in the amended petition, damages were sought in the sum of forty thousand dollars.

Thereafter, and on January 9, 1911, the plaintiff in error filed its second amended original answer, in reply to defendant in error's first amended petition, as follows:

PLAINTIFF IN ERROR'S SECOND AMENDED ORIGINAL ANSWER.

Now comes the defendant in the above cause, and by leave of the Court first had and obtained, files this its second amended answer, and says:

I.

Defendant **demurs** generally to plaintiff's first amended original petition, **because the facts therein alleged show no cause of action.**

II.

Defendant demurs specially to plaintiff's petition and says that said cause of action appears to be brought under the statutes of Kansas provided for the recovery of damages on account of injuries resulting in death, and alleges her damages in the sum of $40,000 while plaintiff is not permitted under the laws of Kansas to recover in excess of $10,000 in such cause of action.

III.

Defendant demurs to the following paragraph in plaintiff's petition specially, to-wit:

> "He (deceased) was a locomotive fireman with the reasonable prospects for promotion to the position of locomotive engineer."

Because the only materiality of such an allegation would be on the question of the amount of recovery, and on that question the proposition of promotion depended upon a great many contingencies and was too speculative to be considered in arriving at the damages sustained by plaintiff.

IV.

It appears from plaintiff's petition that at the time of the injury and death of F. S. Wulf, that defendant was engaged in interstate commerce between the States of Kansas and Oklahoma, and that deceased was in the employ of defendant at the time of his injury and death, and was himself engaged in interstate commerce between the said states and that said cause of action is not governed by the laws of Kansas.

V.

Defendant specially demurs to plaintiff's petition on the ground that it appears from said petition that the cause of action, if any there is, arising from the death of F. S. Wulf, grows out of and depends upon an Act of Congress passed in 1908, known as the Federal Employers' Liability Act, because at the time of the injury and death of F. S. Wulf, defendant was engaged in interstate commerce between the States of Kansas and Oklahoma, and the said F. S. Wulf was in defendant's employ and was himself engaged in such interstate com-

merce at the time of his injury and death, and that such cause of action is governed by said Act of Congress passed in 1908, and **ARISES TO THE PERSONAL REPRESENTATIVE OF F. S. WULF, AND NOT TO THE PLAINTIFF IN THIS CASE.**

VI.

Defendant specially excepts to that portion of said amended petition making the said Sallie E. Wulf a party plaintiff in this cause, and shows that under the Act of Congress, known as the Employers' Liability Act, she is not a proper party to said suit.

VII.

Defendant specially excepts to that portion of plaintiff's amended petition making Sallie C. Wulf temporary administratrix of the estate of said Fred S. Wulf, deceased, in this cause of action, because she was not made a party thereto as such administratrix at the time of the filing of the original petition in this cause.

VIII.

Defendant specially excepts to that portion of plaintiff's petition wherein it seeks to make the said Sallie C. Wulf administratrix of the estate of said Fred S. Wulf, deceased, a party plaintiff in this cause for it appeared that said deceased, Fred S. Wulf, was killed on the 27th day of November, 1908, and the amendment making the said Sallie C. Wulf administratrix, as aforesaid, party plaintiff herein, as appears in plaintiff's amended original petition filed in this cause January 6, 1911, **THE SAME BEING MORE THAN TWO YEARS FROM THE TIME THE CAUSE OF ACTION**

ACCRUED IN THIS CASE AND THE CAUSE OF ACTION, IF ANY, THE SAID SALLIE C. WULF HAD ON ACCOUNT OF THE DEATH OF THE SAID FRED S. WULF IS BARRED BY THE LIMITATION OF TWO YEARS.

IX.

Defendant for general answer to plaintiff's petition denies every allegation therein contained and demands strict proof, **except that this defendant says that at the time the said deceased was killed he was engaged in interstate commerce.**

X.

Defendant for special answer to plaintiff's petition says that the injuries complained of, if any such were in fact sustained, were proximately caused and contributed to by deceased's own negligence and want of ordinary care, in that the train upon which deceased was firing was a long, heavy train, going up grade, and if deceased had exercised ordinary care for his own safety he could and would have discovered there was something wrong on account of the excessive escape of steam and could have left the said engine in time to have escaped injury; that of the said defects and causes, which produced the injuries complained of, if any were produced, the deceased had full notice, and by the exercise of ordinary care on his part would have had full notice in ample time to have avoided the same; **that at the time plaintiff was injured he was engaged in interstate traffic.**

XI.

Further specially answering herein this defendant says that the cause of action, if any there was, in the said Sallie C. Wulf, administratrix of the

estate of Fred S. Wulf, deceased, is barred by the two years' statute of limitation, and defendant here specially pleads said statute in bar of plaintiff's recovery (Rec., pp. 11-14).

Thereafter, the defendant in error filed a supplemental petition, as set forth in the statement and brief of counsel for defendant.

On January 9, 1911, the plaintiff in error presented the exceptions contained in its second amended answer to the defendant in error's first amended petition, and the same were by the Court overruled, and the plaintiff in error duly excepted thereto (Trans. of Rec., p. 75).

The case was tried on January 10, 1911, and the undisputed facts show that Fred S. Wulf was in the employ of the plaintiff in error, as a locomotive fireman, November 27, 1908, and on that date he was acting as fireman on engine No. 488 of the plaintiff in error, pulling a train from Parsons, Kansas, to Osage, Oklahoma; that said train was a freight train, engaged in interstate business; and that when the train had proceeded about four miles on its journey the locomotive exploded and Fred S. Wulf was instantly killed; that at the time of his death deceased was a single man, with no children, but left surviving him a mother and two sisters.

The case was taken by writ of error to the United States Circuit Court of Appeals for the Fifth Circuit, by the plaintiff in error, and, among other errors, the following errors were assigned and relied upon in that court: That the lower court should have sustained the demurrer to the original petition, because it wholly failed to set forth a cause of action, and that if any cause of action accrued or could have accrued under the facts set forth it was under the Federal Employers'

Liability Act; that when the amended pleadings were filed, wherein the defendant in error attempted, as administratrix, to amend the original petition and set forth a cause of action under the Federal statute, it was barred by the two-year limitation contained in the Federal statute. These rights and controversies under the Federal statute were decided against the plaintiff in error by the trial court as well as Circuit Court of Appeals (Trans. of Rec., p. 80).

We submit that it needs no argument to show from this record that the jurisdiction of the lower court was not wholly dependent upon diverse citizenship, but, on the contrary, under plaintiff's own pleadings and proofs, the jurisdiction was wholly based upon the Federal Employers' Liability Act, and that all the contentions and rights claimed by the plaintiff in error thereunder, which were timely made, were decided against it.

To say the least, counsel for defendant in error are disingenuous in their statement of the case and in their motion to dismiss or affirm. The motion to dismiss or affirm because of the want of jurisdiction is based upon the following grounds:

"1. The record discloses that the jurisdiction of the United States Circuit Court, before which this case was tried, was **solely dependent upon the question of diverse citizenship**, and the judgment of the United States Circuit Court of Appeals is final;

"2. The record discloses that the suit of defendant in error **did not involve the construction of a statute of the United States** so as to invoke the jurisdiction of the Circuit Court by reason thereof and thereby authorize the Supreme Court to entertain jurisdiction of this cause;

"3. **The record discloses that the construction of the Employers' Liability Act (if any was involved) was raised solely by the pleadings of the plaintiff in error;** therefore, the jurisdiction of the Circuit Court would not depend on the same so as to authorize the Supreme Court to entertain jurisdiction of this cause."

No one can read the record in this case and come to any other conclusions than:

1. The jurisdiction of the trial court was not solely dependent upon the question of diverse citizenship. It may be admitted that under the original petition the jurisdiction, if any, was based upon diverse citizenship, because no claim was expressly set up under the Federal Employers' Liability Act, but, on the contrary, it was asserted that a cause of action existed under the Kansas statutes. The plaintiff in error filed a demurrer upon the ground that no cause of action was stated, because, if any cause of action could exist under the allegations of the petition, it could only exist under the Federal statute.

2. While the Court did not sustain this demurrer, as it should, yet, the defendant in error promptly filed **an amended petition**, practically abandoning any right or claim under the Kansas statutes, **and expressly relied upon and alleged a cause of action under the Federal Employers' Liability Act.**

3. The record expressly shows that the construction of the Federal Employers' Liability Act was not **raised solely** by the **pleadings of the plaintiff in error**, but, **on the contrary, in the amended petition, defendant in error, as above stated, expressly relied upon the Federal Employers' Liability Act** as giving a cause of action, and sued and recovered thereunder. At page

2 of the statement of counsel for defendant in error these important facts are entirely overlooked.

The defendant in error undertook to do the impossible thing of engrafting an expired cause of action under the Federal statute to a petition wherein it was undertaken to set forth a cause of action which did not and could not exist under the Kansas statutes which had no application whatever. The original petition wholly failing to state a cause of action, there was nothing to amend. No rule of law is better settled than that where an original petition wholly fails to set forth a cause of action it is not amendable. The original petition no more stated a cause of action than if it had relied upon the statutes of Texas or those of any other State or of some foreign State.

The judgment of the Circuit Court was affirmed by the Circuit Court of Appeals (Trans. of Rec., p. 80).

Thereupon the plaintiff in error presented its petition for writ of error to the Circuit Court of Appeals for the Fifth Circuit to review said judgment, which petition, on December 21, 1911, was granted by Honorable Don A. Pardee, Circuit Judge, Fifth Circuit.

For a reversal of this cause plaintiff in error assigned the following errors:

ASSIGNMENT OF ERRORS.

I.

Said Circuit Court of Appeals erred in not sustaining the eleventh assignment of error upon the record in said cause, which is as follows:

The Court erred in refusing defendant's requested instruction No. 1 as follows:

1. In this case you are instructed to return a verdict for the defendant (Rec., p. 85).

II.

Said Circuit Court of Appeals erred in not sustaining the ninth assignment of error upon the record in said cause, which is as follows:

> The Court erred in overruling the following exception of defendant to plaintiff's first amended original petition.

8. Defendant specially excepts to that portion of plaintiff's petition wherein it seeks to make the said Sallie C. Wulf administratrix of the estate of said Fred S. Wulf, deceased, a party plaintiff in this cause, for it appears that said deceased, Fred S. Wulf, was killed on the 27th day of November, 1908, and the amendment making the said Sallie C. Wulf administratrix, as aforesaid, party plaintiff herein, as appears in plaintiff's amended original petition filed in this cause January 6, 1911, the same being more than two years from the time the cause of action accrued in this case and the cause of action, if any, said Sallie C. Wulf had on account of the death of the said Fred S. Wulf is barred by the limitation of two years (Rec., p. 85).

III.

Said Circuit Court of Appeals erred in holding, in effect, that defendant in error's original petition was a suit brought under the provisions of the Federal Employers' Liability Act of 1908 (Rec., p. 86).

IV.

Said Circuit Court of Appeals erred in holding that the amended petition filed by defendant in error related back to the original institution of this suit (Rec., p. 86).

V.

Said Circuit Court of Appeals erred in rendering judgment against plaintiff in error and in favor of said defendant in error for costs of suit in said Court of Appeals (Rec., p. 86).

The same errors were assigned in the Circuit Court of Appeals and in presenting same we asserted, (*a*) that the cause of action plead in defendant in error's original petition was based on the Kansas death statute; (*b*) that the first amended petition asserted a cause of action under the Act of Congress known as the Federal Employers' Liability Act of 1908; (*c*) that so much of said amended petition as asserted a cause of action in her as administratrix under the Federal Employers' Liability Act asserted a new cause of action; (*d*) that the same having been asserted more than two years after the death of Fred S. Wulf was barred by the statute of limitation contained in said Federal Employers' Liability Act; (*e*) that the cause of action was controlled by the Federal Employers' Liability Act, which superseded the Kansas statute in a case of the character here presented; (*f*) that the undisputed evidence showing that the cause of action having arisen more than two years before the same was asserted in court that it was barred and that plaintiff in error was entitled to an instructed verdict; (*g*) that an action for damages under the Federal Employers' Liability Act can only be maintained by an administrator or executor; (*h*) that the procedure provided by the Federal Employers' Liability Act governs as to cases arising under it; (*i*) that the substitution of a personal representative as a party plaintiff in this case was the institution of a new suit. These propositions were dis-

posed of by the Circuit Court of Appeals in the following opinion:

> "**Under the Kansas law, as well as under the Federal Employers' Liability Act, Mrs. Sallie C. Wulf was the sole beneficiary and entitled to all damages resulting from the negligent killing of her son, Fred S. Wulf, therefore in the absence of objections made in limine it was immaterial whether the suit to recover the said damages was prosecuted by Sallie C. Wulf individually, or by Sallie C. Wulf, administratrix of the estate of Fred S. Wulf, or in both capacities.**"
>
> "The cause of action originally sued on was to recover damages for the negligent killing of Fred S. Wulf, and this cause of action was not subsequently abandoned or changed by any amendment in the pleadings nor by the permission of the trial court that the said Sallie C. Wulf might prosecute the suit individually and as administratrix of Fred S. Wulf; and as the suit was brought within two years from the death of said Fred S. Wulf **the statutory bar under the Kansas law or under the federal Employers' Liability Act was not well pleaded.**"
>
> "On the whole case we find no prejudicial error warranting a reversal. The judgment of the Circuit Court is affirmed" (Rec., p. 80).

BRIEF ON MOTION TO DISMISS.

I.

The original petition wholly failed to state a cause of action.

While in the original petition filed by Mrs. Sallie C. Wulf in her individual capacity and as mother of the deceased, the ground of recovery was based wholly upon the Kansas statutes, yet, in said petition, such facts were set forth as conclusively showed that there could be no recovery under the Kansas statutes; for, among other things, in said petition it was expressly alleged that the plaintiff in error was a common carrier by railroad and engaged in interstate commerce at the time the deceased received the injuries from which he died, and that deceased himself, as an employe of such carrier, was so engaged in interstate commerce. To this petition a demurrer was filed, but not sustained. It should have been sustained, because it is well settled that the Federal Employers' Liability Act of 1908, as amended by the Act of 1910, supersedes all local or State regulations as to causes of action falling within its terms.

Mondou v. N. Y. N. H. & H. R. R. Co., 223 U. S. 1 (32 Sup. Ct. 169).

II.

(*a*) **The original petition, wholly failing to state a cause of action, was not amendable, either as to parties or as to the subject-matter.**

No cause of action having been stated in the first petition, it cannot, after the running of the statute of limitations, be amended so as to state a cause of ac-

tion, and an attempt to do so is in effect the filing of an original petition and the commencement of a new action, and the amended petition must be treated as though no action had been pending prior to the filing thereof.

After the lapse of more than two years from the time of the death of Fred S. Wulf, can a new action be commenced by the filing of a so-called amended petition, and can the bar of the statute be avoided by calling it "amended petition".

The first petition did not state a cause of action, and therefore no action was pending.

In Graham v. Scripture, 26 Howard's Practice 501, a cause of action is defined by the Court as follows:

> "A cause of action is synonymous with right of action—a right of recovery, and a complaint which does not show a right of recovery, fails to show a cause of action. The complaint should state facts sufficient, if admitted or proved, to authorize a recovery of judgment."

In Parker v. Enlow, 102 Ills. 272, it is decided that

> "a good cause of action can mean no more than cause of action. A cause of action not good is no cause of action".

In Williamson v. Chicago, Etc., R. R. Co., 84 Ia. 583, it is said:

> "Cause of action has been held to mean every fact which is material to be proved to entitle the plaintiff to succeed; every fact which the defendant would have a right to traverse. In such a sense it would embrace not only the contract in the case but the breach of it; for both must be proven in order to recover."

In Bucklin v. Ford, 5 Barbour (N. Y.) 393, it is decided that a cause of action is a claim which may be enforced.

In Douglas v. Forrest, 4 Bing. 704, it is decided that cause of action means "the right to prosecute an action with effect".

In Veeder v. Baker, 83 N. Y. 160, the Court says with reference to what is a cause of action:

> "It is composed of the right of the plaintiff and the obligation, duty or wrong of the defendant. This combined, it is sufficiently accurate to say, constitute the cause of action."

In Bruil v. N. W. M. R. Assn., 72 Wis. 433, it is decided as follows:

> "The words 'cause of action' as here used, would seem to be synonymous with right of action, and would include the act of omission, without which there would be no cause of action or right of recovery. A cause of action is said to accrue to any person when that person first comes to a right to bring an action (1 Bouv. Law Dict., 291). 'Cause of action; the fact, or combination of facts which gives rise to a right of action' (1 Rap. & L. Law Dict. 180)."

The above authorities, it would seem, make it perfectly clear that no action was pending between these parties prior to the filing of the amended petition on January 6, 1911. That prior to that date no right of recovery had been asserted by the plaintiff below against the defendant. The filing of the amended petition, therefore, must be treated as the commencement of the action, and the right to invoke the plea of the statute of limitations as a defense cannot be

avoided by calling the petition then filed an amended petition. As the first petition did not state a cause of action, there was absolutely nothing to amend.

In Vol. 1, Am. & Eng. Enc. of Pleading & Practice, 510, it is laid down as a rule of pleading, as old as the books themselves, that before an amendment can be made, there must be something to amend, and the text is in the following language:

> "At common law the general rule was that there must be something in the record to amend by, but under the statutes of amendment the power of the Court is not now considered to be thus limited. **Nevertheless, there must be something to amend, and a declaration or complaint which wholly fails to state any cause of action whatever, cannot be amended, at least in those states where an amendment introducing a new cause of action is not allowed.**"

Numerous authorities in support of this proposition are cited from the reports of nearly all the states in the Union. Kansas is one of the states where an amendment introducing a new cause of action is not allowed. See:

Sec. 139, Chap. 95, Gen'l Stat. of Kansas, 1897,

which reads as follows:

> "The Court may before or after judgment, in furtherance of justice and on such terms as may be proper amend any pleading, process or proceeding by adding or striking out the name of any party, or correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case, or conform the pleading or proceeding to the facts

> proved, when such amendment does not change substantially the claim or defense; and when any proceeding fails to conform in any respect to the provisions of this code, the Court may permit the same to be made conformable thereto by amendment."

In case of Schroeder v. Santa Fe, 56 Kas. 731, it is decided that no new cause of action can be inserted or engrafted by way of amendment, after the bar of the statute has become complete. Applying the doctrine announced in this case to the case at bar, the Court below erred in overruling the demurrer filed by defendant below to the second petition, yet it states for the first time a cause of action against the defendant below, and shows on its face that such cause of action at the time it was first stated, was long since barred by the statute of limitations.

The case of Lasater *et al.* v. Fant, 43 S. W. 321, was an action of forcible entry and detainer. The complaint filed was so defective as not to state any cause of action, and application was made for leave to amend, which was granted by the trial court. On error to the Supreme Court it was held that a complaint so defective as to state no cause of action could not be amended, that it was equivalent to the bringing of a new action. In concluding the opinion, the Court used the following language:

> "The complaint is so defective that it states no cause of action whatever, and an amendment of it in the County Court would be equivalent to the bringing of a new action, which cannot be done in that court; hence it is proper to reverse the judgment and dismiss the cause. Reversed and dismissed."

The same doctrine has been announced by the Supreme Court of the District of Columbia in cases of

Johnson v. Dist. of Columbia, 1 Mackey (D. C.) 427; and

Lewis v. Washington & G. R. R., 6 Mackey (D. C.) 556,

wherein it was squarely held by that Court that where the petition failed to state a cause of action, and the case was reversed for that reason and remanded for a new trial, it could not be amended so as to state a cause of action after the bar of the statute of limitations had accrued.

In the case of Jewett v. Malott, 60 Kan. 509, wherein the amended petition was stricken from the files because it changed the nature of the cause of action, the Court held that an amendment changing the nature of the cause of action would not be allowed. Its opinion is as follows:

> "While the courts are and should be liberal in permitting parties to amend their pleadings, they are not warranted in allowing amendments which substantially change the claim or defense previously relied on."

The case of Walker v. O'Connell, 59 Kas. 306, is in a great many respects very similar to the case at bar, and in that case the Court held that where the petition failed to show a right of action in the plaintiff by alleging necessary averments, it could not be amended by inserting these averments after verdict, and where such amendment was allowed by trial court the case was reversed. In the opinion, the Court uses the following language:

> "We think it was not within the power of the

> Court, at the late time this amendment was proposed, to allow it to be made, and through its retroactive effect to cure the substantial errors which had been committed through lack of its earlier making. To such effect are the authorities."

Right in line with our contention, and with the case of Schroeder v. Santa Fe, *supra*, is the case of

City of Kansas City v. Hart, 60 Kas. 684,

in which all cases bearing upon this question are thoroughly and in an exhaustive manner reviewed. In its opinion this Court says:

> "It is true, as a general rule, that amended pleadings relate back to the commencement of the action, but this rule never obtains where a separate and distinct cause of action is set up by way of amendment. **Even though the amendment might otherwise be allowable, it is generally held that it will not be permitted when the effect will be to make the state of facts pleaded relate back so as to avoid the statute of limitations if the new cause of action would otherwise be barred.**"

The same doctrine has been announced by the Supreme Court of Iowa in case of

Box v. C. R. I. & P., 78 N. W. 694.

It is also sustained in the following cases:

Buntin v. C. R. I. & P., 41 Fed. 744;
U. P. Ry. Co. v. Wyler, 15 Sup. Ct. Rep. 877;
So. Ex. Co. v. Palmer, 48 Ga. 85;
Meeks v. So. Pac., 61 Cal. 149;
Parsons Water Co. v. Hill, 46 Kas. 145;
Ill. Cent. R. R. v. Campbell, 49 N. E. 314;
Hiatt v. Auld, 11 Kas. 176;
Dobson v. Noyse, 39 Kas. 471;

R. R. Co. v. Sloan, 125 Ills. 73;
R. R. Co. v. Cobb, 64 Ill. 130;
Scott v. East L. R. R. Co., 75 Tex 84;
Harper v. Ill. Cent. R. R., 74 Ill. App. 74;
R. R. Co. v. Wood, 51 Ga. 515;
Lilley v. Charlotte, Etc., R. R. Co., 32 S. Car. 142;
Bangor, Etc., R. R. Co. v. Smith, 49 Me. 9;
McLean v. Paschal, 62 Tex. 102.

(*b*) **The first amended petition of defendant in error as administratrix alleged an entirely new and distinct cause of action, and there was a departure from law to law, and such new cause of action was clearly barred by the Federal Employers' Liability Act.**

While the general rule is that an amendment of a defective declaration, petition or complaint relates back to the time of the filing of the original pleading, so that the running of the statute of limitations against the amendment is arrested thereby, yet where the amended declaration or petition brings forward a new and independent cause of action the bar of the statute of limitations applies to it.

Texas, Etc., R. R. Co. v. Cox, 145 U. S. 593;
Atlantic, Etc., R. R. Co. v. Baird, 164 U. S. 393;
Union Pacific R. R. Co. v. Wyler, 158 U. S. 285;
Sicard v. Davis, 6 Pet. 124.

The doctrine for which we contend applies even where the amended pleading is filed by leave of Court and by consent.

Union Pacific R. R. Co. v. Wyler, 158 U. S. 285.

In Sicard v. Davis, *supra*, the plaintiff brought an acton of ejectment, in which he laid his demise as having been made by Steven Sicard on January 30, 1815,

and at the November Term of the court in 1821 he was given leave to amend by laying his demise in the name of the heirs of the original grantee of the lands, Joseph Phillips and others, to whom the land had been conveyed before the execution of the deed under which Sicard acquired his title. The Supreme Court, speaking through Mr. Chief Justice Marshall, held that limitations might be pleaded to the second allegation, though not to the first, because "the second count in the declaration being on a demise from a different party asserting a different title, was not distinguishable, so far as respects the bar of the act of limitations from a new action".

III.

When the amended petition was filed by the defendant in error as administratrix, any cause of action accruing under the Federal Employers' Liability Act was barred.

As shown by the transcript of record and our statement, the deceased, Fred S. Wulf, was killed on November 27th, 1908, and the cause of action, if any, under the Federal Employers' Liability Act accrued on that date. The amended petition of the defendant in error, as administratrix, setting up and claiming a cause of action under the Federal Employers' Liability Act, was not filed until January 6, 1911, more than two years after the cause of action accrued, and, therefore, under Section 6 of the Federal Employers' Liability Act was clearly barred.

IV.

The above questions were timely and properly raised by demurrer and by requested instructions, and suit

under Employers' Liability Act can only be brought by the personal representative.

In the case of **Harshman v. No. Pac. Ry. Co.** (Supt. Ct., N. D., 1905), 103 N. W. 413, it is held that the action can only be brought by the person authorized by the statute, and cannot be maintained by the sole beneficiary, because there is no statutory sanction for such an action. The question was raised by an objection to the introduction of evidence and by motion for a directed verdict. The Court said:

> "The view we have taken of this case makes it necessary to consider but one question, and that is whether the complaint states a cause of action in plaintiff's favor. Counsel for defendant contend that it does not, and we fully agree with this contention. * * * It may be, and probably is, true, as counsel for plaintiff contend, that the defendant's general objection to the introduction of evidence as well as the ground stated for granting a directed verdict, did not definitely apprise the trial court or opposing counsel of the nature of the objection now being considered; but that does not affect our right to consider it. This is not a case where a cause of action is substantially but defectively stated, and in which the defect could be cured by amendment. The complaint in this case not only does not state a cause of action, but it shows upon its face that it cannot be made to state a cause of action. It is well settled that where a complaint wholly fails to set out a substantial cause of action, and is incapable of being made good by amendment, the objection to its sufficiency may be taken at any stage of the proceedings, even upon appeal and upon the Court's own motion.
>
> **"No amendment can make the present complaint state a cause of action in plaintiff's favor. The**

only way it can be made to state a cause of action in favor of anyone is to substitute the personal representative of the decedent as plaintiff, and that cannot be done under the guise of an amendment, for that would not continue the existing suit except in form, but would create and institute a new suit or a new question, and in a controversy between different parties.

"This case is not one of defect of parties or of want of legal capacity to sue. It is purely of a want of a cause of action. The objection that a complaint does not state a cause of action 'calls in question not only the sufficiency of the facts stated in the complaint to constitute a cause of action, but also the right or authority of the particular plaintiff to institute or maintain a suit upon such a cause of action'. Frazer v. State (Ind. Sup.), 7 N. E. 203; Tipton County v. Kimberlin (Ind. Sup.), 9 N. E. 407, and cases cited."

In Atchison Water Co. v. Price *et ux.* (C. of A., Kan., 1900), 59 Pac. 677, the plaintiff failed to establish that there had been no personal representative appointed. If such representative had been appointed he was the proper party to maintain the suit. The Court said:

"This objection was urged as a ground for a new trial. The necessity of proof of this fact in order to entitle the plaintiffs to maintain their suit at all is not an open question. The Supreme Court held, in City of Eureka v. Merrifield, 53 Kan. 794, 37 Pac. 113, that a petition which failed to allege the fact failed to state a cause of action, and, if it is necessary to allege it, it is necessary likewise to prove it. Counsel for the defendant in error contends that the action is not based upon the statute creating a cause of action in such cases,

but is purely a common-law action. The same contention was made in City of Eureka v. Merrifield, *supra*, and in answer thereto the Court said: 'It is suggested that the action was brought to recover for the damages the parents sustained by reason of the loss of anticipated services that might have been rendered to them by the deceased up to his majority, and therefore, this action is maintainable by them. At common law this action could not be maintained. McCarthy v. Railroad Co., 18 Kan. 46.' The Court also cites and follows Insurance Co. v. Brame, 95 U. S. 754, 24 L. Ed. 580; Hil. Torts, p. 87, Sec. 10. In this case a recovery of exactly the same nature is sought, and hence we are concluded upon the question by the Supreme Court's decision, as well as upon the other. The plaintiffs failed to bring themselves within the conditions prescribed by the statute, and having no right to maintain the action at common law, or aside from the statute, they failed to show a right of recovery; so the Court erred in overruling the demurrer to the plaintiff's evidence, and erred also in denying the defendant's motion for a new trial upon this ground."

In Vaughn v. Kansas City N. W. R. Co. (Sup. Ct., Kan., 1902), 70 Pac. 602, a question similar to that presented in the Price case, *supra*, was before the Court. The Court said:

"Upon the trial of the action no testimony whatever was offered in support of the allegation that no personal representative of the estate of Overton Vaughn had been appointed. The District Court sustained a demurrer to plaintiff's evidence, and its own action in this respect is the principal ground of error alleged in this court. * * * Therefore, when it is said in City of Eureka v.

Merrifield, 53 Kan. 794, 37 Pac. 113, that 'the action is maintainable only by the person who is, by the terms of the statute, authorized to maintain it', no more is stated than that the action is maintainable only by the precise person who is, by the terms of the statute, permitted to do so."

In the case of Walker v. O'Connell, decided by the Supreme Court of Kansas (1898), 59 Kan. 306, 52 Pac. 894, the Court said:

"The action was brought under section 419 of the Code of Civil Procedure (Chapter 95, Gen. Stat. 1897), by the plaintiff as the widow of John O'Connell. In her petition she alleged that the deceased was a resident of this State, but she did not in the first instance allege the non-appointment of an administrator of his estate. Before the trial the defendants moved for judgment upon the pleadings, and also at the commencement of the trial they objected to the introduction of evidence under the petition. These motions were overruled, but the question involved under them again arose upon demurrer to the plaintiff's evidence after she had rested her case. This demurrer was overruled, but before the Court proceeded the plaintiff, by leave of Court, reopened her case, and, over the defendant's objections, testified that no administrator of her husband's estate had been appointed. The same question again arose upon a request by the defendants to instruct the jury that the plaintiff must allege and prove if John O'Connell was a resident of the State, that no administrator of his estate had been appointed. The claim made by the defendants in support of these various motions and objections, and the request to instruct was, that a right of action for damages for death is statutory and cannot be maintained except un-

der the statutory conditions; that in such case a widow's right to sue is conditioned upon the non-appointment of an administrator of the decedent's estate; therefore, the petition which in this instance lacked the averment of non-appointment failed to bring the case within the statutory terms. This claim was well taken, and should have been sustained."

In the case of Hamilton v. Hannibal & St. J. Ry. Co., 39 Kan. 56, 18 Pac. 57, the Court said:

"In her petition the plaintiff alleges that the deceased left surviving him minor children. The statute upon which she based her action provides, as we have seen, that the widow may sue and recover damages, but if she fails to bring her action within six months the right thereafter rests in her minor children. The right of action under the statute therefore only remained absolute in the wife for a period of six months. After that time it was vested absolutely in the children. The provision designating when and by whom the suit may be brought is more than a mere limitation. It is a condition imposed by the Legislature which proves the right of recovery, and upon which its exercise depends."

In Holston *et ux.* v. Dayton Coal & Iron Co. (Sup. Ct. Tenn., 1895), 32 S. W. 486, the Court said:

"At common law a right of action for personal injuries resulting in death, died with the person thus injured. Bream v. Brown, 5 Colo. 168; League v. Railroad, 91 Tenn. 459, 19 S. W. 430. By statute (Act 1851-52, carried forward into Milliken & Vertrees' Compilation as sections 3130, 3131) the rule of the common law was so far modified as to save the right of action of a person dying by the

wrongful act of another by providing that such right should not abate or be extinguished by death, and that the suit might be instituted by the personal representative of the deceased for the benefit of the widow or next of kin, and by further providing that, if he declines to bring such suit, the widow and children of the deceased might, without his consent, use his name in bringing such suit. Under that act it was uniformly held that, although the suit was for the personal benefit of the widow and next of kin, yet they could not sue in their own names, but the suit would lie only in the name of the personal representative. * * * The right of action surviving to the personal representative, and not to the father and mother as next of kin, the suit can only be brought by such personal representative, even though the father and mother may be beneficially entitled to the recovery as next of kin."

In the case of Collins Coal Company v. Hadley (Appellate Ct. Ind., Div. No. 2, 1905), 75 N. E. 832, an action was brought by an administratrix, who was the wife of the deceased, for the damages for whose death the suit was instituted. The statute in Indiana provided that the action must be brought by the widow's children, or other persons specified in the statute. We thus have in this Hadley case the exact principle of law which is presented in the case at bar, but in the case at bar the statute is just the reverse of the Indiana statute in that the personal representative must maintain the action and not the widow or the children. The Court held that a demurrer to the complaint on the ground that it did not state facts sufficient to constitute a cause of action raised the question of the

right of the plaintiff to maintain the suit. In the words of the opinion, it is said:

> "'A statute giving a remedy which did not exist at common law, not only speaks affirmatively but it also speaks negatively. In such circumstances the maxim, *expressio unius est exclusio alterius*, has a particular application. Sutherland Stat. Constr., Sec. 325. So far as remedy by way of damages is concerned, the rule is that when a new right is conferred by statute, and an adequate provision for its enforcement is therein made, the statutory remedy is exclusive. * * *' In this State it is no longer a question of legitimate debate that where a special statute gives a right of action to a designated class or classes of persons, they, and they alone, can maintain such an action. **The demurrer to the complaint on the ground that it did not state facts sufficient to constitute a cause of action properly questions the right of the plaintiff therein to maintain such action**" (bold-face type ours).

In the case of Boyd v. Brazil Block-Coal Co. (App. Ct. Ind., 1900), 57 N. E. 732, which was an action for death under the Indiana statute, the Court said:

> "The first question to be determined in this appeal is whether, under the statute, the personal representative of the deceased has any right of action. Counsel for appellee insists that he has not, and for that reason, if for no other, the demurrer was by the lower court properly sustained to each paragraph of the complaint. **The question is properly raised by the demurrer for want of facts**" (bold-face type ours).

In Lower v. Segall (Sup. Ct., N. J., 1896), 34 Atl. 945, an action was brought in New Jersey for death under

the Pennsylvania statute. The administratrix who brought suit was the widow of the deceased. She was the proper person to bring the action under the Pennsylvania statute, under which the action was brought. It appears from the opinion that a general demurrer was filed to the petition. The Court said:

> "The right of action being vested in the widow, she is the only person who can maintain the suit, whether in the domestic tribunals or elsewhere, since she is everywhere the widow of the husband whom she survives.
>
> From these considerations it is clear that the plaintiff cannot, as administratrix, maintain this action, **and upon this ground the demurrer is sustained.**"

In the case of Nash v. Tousley, 28 Minn. 5, 8 N. W. 875, cited in the original brief, an order sustaining a demurrer was affirmed because the action was not instituted by an executor or administrator, as required by the statute.

In Duvall v. Hunt (Sup. Ct. Fla., 1894), 15 Sou. 876, the Court said:

> "The existence or non-existence of anyone having the precedent right of action under the statute **enters into the very substance of the right of action itself** when instituted by any of the named classes of persons after the first; and when the suit is brought by any of these classes, except the widow or husband, the declaration, in order to show a cause of action should affirmatively show the non-existence of any other person having a precedent right of action over the plaintiff under the statute." (Bold face type ours.)

In Barker v. Hannibal & St. Jo. Ry. Co., 91 Mo. 86, at pages 91 and 94, the Court said:

> "Our statute on this subject, both gives the right of action, and provides the remedy, for the death, where none existed at common law, and where an action is brought under the statute, it can only be maintained subject to the condition and limitations imposed thereby. In conferring the right of action, and in providing such remedy, in designating when and by whom, suits may be brought, it was, as a matter of course, competent for the legislature to provide and impose such conditions as it might deem proper, and the condition thus imposed, modify and qualify the right of recovery, **or form**, rather, we think, **a part of the right itself, and upon which its exercise depends.** * * * In statutory actions of this sort, the party suing must bring himself strictly within the statutory requirements, necessary to confer the right, and **this must appear in his petition; otherwise, it shows no cause of action.**" (Bold face type ours.)

In Major v. Burlington, C. R. & N. Co. (Sup. Ct. Ia., 1902), 88 N. W. 815, 816, it is said:

> "Indeed, it seems to be the general rule that whenever a right is created by legislation, and at the same time a remedy is prescribed, **such remedy is part of the right and exclusive.**" (Bold face type ours.)

The identical question urged by counsel for defendant in error has been answered in the case of Fithian v. St. L. & S. F. Ry. Co. (C. C. W. D., Ark., 1911), 188 Fed. 842. In that case the action was brought by the widow under the Federal Act, and the demurrer to the

petition was sustained. It appears from the opinion that the plaintiff had alleged facts sufficient to show the interstate commerce feature of the case, and demurrer was sustained. District Judge Thieber said:

> "As a right of action for injuries resulting in death is entirely based upon statute, no such right existing at common law, the law is well settled that such an action can only be brought in the name of the person or persons to whom the right is given by the statute under which it is sought to prosecute it, upon the well-settled principle that when a statute gives the cause of action and designates the person who may sue, they alone can sue."

For the convenience of this Court extracts from other of the cases cited by Judge Thieber will be quoted.

In the case of Usher v. W. J. R. R. Co., 126 Pa. 206, 17 Atl. 597, the Court said:

> "As to the first there is no room for latitude of construction. The meaning of the language used is plain and unambiguous and its directions mandatory. It is an established rule that statutory remedies are to be strictly pursued, and we have no right when the Legislature has commanded one form to say that another will serve the purpose equally well. The lawmaking power has settled the remedy as well as the right, and Courts are not authorized to vary or depart from either."

In Hagen v. Kean, 3 Dill. 124, Federal Cases 5899, Vol. 11, Circuit Judge Dillon said:

> "The right of action in a case of this kind is created by statute, and it must be brought by and

in the name of the person whom the statute prescribes shall bring it—that is, 'the personal representative' of the deceased. And these words in the Statute of Illinois have been authoritatively construed by the Supreme Court of that State to mean 'the executor or administrator'."

In Illinois Central Ry. Co. v. Hunter (Sup. Ct. Miss., 1893), 70 Miss. 471, 12 Sou. 482, the Court said:

"An action for injury resulting in death based on the constitutional provision mentioned, must be brought by the executor or administrator, and there is nothing in the Constitution to suggest that they were used in a different sense in the section under consideration. The Constitution does not give the right of action it creates to parent or child, or husband or wife, but to the executor or administrator. This action is not properly brought under Section 663 of the Code of 1892, for, if it was maintainable under that, the mother alone should have been plaintiff. Because the plaintiff has no right of action, the judgment is reversed and the cause remanded."

In the case of Killian v. Sou. Ry. Co. (Sup. Ct. N. C., 1901), 38 S. E. 873, under a statute giving the right of action to the administrator, it was held that the father could not maintain the action for the death of his son in his individual capacity. Moreover, this question in the Killian case was raised in the Supreme Court by a preliminary plea, *ore tenus*, to dismiss the action because the complaint did not state facts sufficient to constitute a cause of action. The Supreme Court sustained this motion, saying:

"Hence, where the right of action is given to the personal representative, 'the parent cannot

maintain it, even when the statute expressly provides that the recovery shall be for his or her benefit. In such cases only the executor or administrator can sue. * * *' The right conferred by statute is plainly given to the personal representative only. Let it be entered: Action dismissed."

The cases above referred to show conclusively that the question here presented is not one of legal capacity to sue, or defect of parties, which under our State statute may be waived under some circumstances, but is one that goes to the very right of action itself. The distinction has been drawn in the cases above referred to, and has also been clearly drawn in other cases involving the same principle, although not relating specifically to actions for death.

In the case of Hunt v. Monroe (Sup. Ct., Utah, 1907), 91 Pac. 270, the Court said:

"But respondent insists that the question was not properly raised by demurrer, since in the demurrer the alleged ground was a want of legal capacity to sue. It may be conceded that as a general rule the want of legal capacity to sue, referred to in Section 2962, Rev. St. 1898, means a want of capacity to appear in a court and maintain an action, regardless of in whom is vested the right of action. In this State any person of sound mind, of lawful age, and under no restraint or legal disability, has the legal capacity to sue, although it may ultimately appear that he has no cause of action. Where, however, it appears from the face of the complaint, as in this case, that the right to maintain the action is not in the plaintiff, but in another, the complaint is defective for want of a statement of sufficient facts to main-

tain the action. It is elementary that a complaint good in law must not only state a complete cause of action against the defendant, **but it must also, show a right of action in the plaintiff.** In this respect the complaint in this case was defective, and hence vulnerable by demurrer. **That such a defect may be raised by demurrer is amply sustained by the authorities.**" (Bold face type ours.)

In McKenney v. Minahan (Sup Ct. Wis., 1903), 97 N. W. 489, the Court said:

> "Want of legal capacity within the meaning of Section 2649, Rev. St. 1898, refers to personal disability, as infancy, idiocy, coverture, and the like, or to 'want of title to the character in which plaintiff sues' (Bliss, Code Pl., Secs. 407, 408), as where an executor or administrator sues, not having complied with the statutory requisites thereto, or where an executor sues, not having proved the will under which he claims, or an assignee sues, not having first duly qualified as such. A defect going to the cause of action itself as regards the plaintiff, one showing that in no event and under no circumstances, and in no capacity, does the plaintiff own or represent the cause of action sought to be enforced, does not fall within the class of cases suggested. Such a defect comes under the sixth ground of demurrer in Section 2649, Rev. St. 1898, that the complaint does not state facts sufficient to constitute a cause of action, and is not waived, of course by failing to suggest it by answer or demurrer."

In the case of Ward v. Pertie (Ct. of Appeals, N. Y., 1898), 51 N. E. 1002, the Court said:

> "The plaintiff claims that as the defendants did not raise the question of his capacity to sue

by demurrer or answer under Sections 488 and 490 of the Code of Civil Procedure, they thereby waived the right to claim that the receiver cannot maintain this action. There is a difference between capacity to sue, which is the right to come into court, and a cause of action, which is the right to relief in court. Incapacity to sue exists when there is some legal disability, such as infancy or lunacy, or a want of title in the plaintiff to the character in which he sues. The plaintiff was duly appointed receiver, and has a legal capacity to sue as such, and hence could bring the defendants into court by the service of a summons upon them, even if he had no cause of action against them. On the other hand an infant has no capacity to sue, and hence could not lawfully cause the defendants to be brought into court, even if he had a good cause of action against them. Incapacity to sue is not the same as insufficiency of facts to sue upon."

In Hamilton v. McAdoo (Sup. Ct. Minn., 1900), 84 N. W. 118, the Court said:

"Plaintiff's counsel contend that their failure to sufficiently allege in the complaint the representative character of their client has been waived, because no demurrer was interposed upon the ground that plaintiff had not legal capacity to sue, or, if a demurrer would not lie, that there has been a waiver, because the question of plaintiff's capacity to sue was not raised by answer. Gen. St. 1894, Sections 5234, 5235. This contention is completely answered by what was said in Rossman v. Mitchell, *supra*, when disposing of a motion for a reargument, in these words: 'The complaint in question stated a cause of action in favor of an assignee or receiver of the insolvent, if there was one, but it failed to state facts showing

that the plaintiff was such receiver or assignee.' The complaint here failed to state a cause of action, and hence an objection on that ground was not waived by failing to take advantage of the defect by demurrer or by answer. The question could be raised by objection to the introduction of the documentary testimony, or by motion to dismiss when plaintiff rested, as it was."

In State v. Moore (Sup. Ct. Neb., 1899), 78 N. W. 529, the Court said:

"In Farrel v. Cook, 16 Neb 483, 20 N. W. 720, it was held that the want of legal capacity to sue involves only a general legal disability, such as infancy, idiocy, want of authority. Therefore, when the plaintiff is a natural person, under no general disability to maintain actions, a failure to state a cause of action in his own favor goes to the sufficiency in substance of the petition, and not to his legal capacity."

V.

By the amended petition, defendant in error, by her own pleading and by her own statement of the cause of action, relied upon and sought a recovery against the plaintiff in error under and by virtue of an act of Congress, and therefore the Court had jurisdiction of the case, wholly irrespective of the citizenship of the parties.

Where the jurisdiction of the Circuit Court does not depend entirely upon diversity of citizenship, but also rests on the ground that the case arose under the Constitution or laws of the United States, then the decision of the Circuit Court of Appeals is not final.

In the case at bar it is clearly apparent that recovery was sought and could only be had under the Federal

Employers' Liability Act, and that the defendant in error, by her own pleading, relied upon the Federal Employers' Liability Act, and the record shows several controversies and disputes between the parties as to the true effect, interpretation and proper construction of the Federal Employers' Liability Act, and that these contentions, so far as the plaintiff in error was concerned, were timely raised and decided against it, both by the trial court and by the United States Circuit Court of Appeals.

Counsel for defendant in error rest their motion to dismiss wholly upon the proposition that inasmuch as in the original petition filed by Mrs. Sallie C. Wulf in her individual capacity and as mother of the deceased, and wherein a recovery was sought under the Kansas statutes, and wherein the jurisdiction of the Federal Court was based upon diversity of citizenship and not upon the Federal Employers' Liability Act, that therefore, notwithstanding the defendant in error afterwards filed an amended petition asserting and claiming a cause of action as administratrix under the Federal Employers' Liability Act, and notwithstanding the case was tried upon the amended petition and a recovery had thereunder, that the jurisdiction of the trial court was still wholly dependent upon the diversity of citizenship. If this contention can be upheld, then there is a very simple method always available of evading the jurisdiction of this court, namely: In the first instance, file a suit basing jurisdiction upon diversity of citizenship, and set forth a fictitious cause of action which has no basis in fact, and thereafter immediately file an amended petition setting forth a cause of action under the Act of Congress.

But the contention of counsel for defendant in error

cannot be upheld, as has been repeatedly decided by this court. It is only necessary that the Federal question appear somewhere in the record by some proper pleading of the plaintiff. It makes no difference whether it is in the original petition, an amended petition, or a supplemental petition.

Bankers Casualty Co. v. M. St. P., Etc., Ry. Co., 192 U. S. 380;
Mississippi Railroad Commission v. I. C. R. R. Co., 203 U. S. 341;
Henningsen v. U. S. Fidelity & G. Co., 208 U. S. 404;
Florida C. P. R. Co. v. Bell, 176 U. S. 321;
Warner v. Searle & H. Co., 191 U. S. 195;
Howard v. U. S., 184 U. S. 676;
Northern Pac. R. Co. v. Soderberg, 188 U. S. 526;
Union Pacific R. Co. v. Harris, 158 U. S. 326;
Chicago Junction Co. v. King, 222 U. S. 222, 32 Sup. Ct. 80.

Under the 1910 amendment to the Federal Employers' Liability Act, concurrent jurisdiction is conferred upon the state courts. It is entirely clear that if this suit had been instituted in the state court for a recovery under the Federal Employers' Liability Act, and the same points had been raised and decided adversely to the plaintiff in error, that a writ of error could have been sued out from this court to the highest court of the State of Kansas.

It is well settled by this court (and no citation of authorities is necessary) that where a suit is filed in a state court, it can be removed on the grounds of diverse citizenship, or upon the grounds of a Federal controversy, whenever the diversity of citizenship

arises or whenever the Federal question is introduced into the case, and it is not necessary that the diversity of citizenship should exist or the Federal question should have arisen upon the institution of the suit.

As clearly appears from our statement, the case was tried and a recovery had under the Federal Employers' Liability Act, and all of the controversies as between the parties arose under that Act. It is folly, therefore, to say that the Federal statute was not relied upon by the defendant in error, and that no controversy arose under it which was decided against the plaintiff in error. Nearly the whole of the brief of counsel for the defendant in error upon the motion to dismiss or affirm is addressed to the Federal Employers' Liability Act and to the controversies which arose under it in the trial of the case. Nothing is said about the fictitious cause of action set up in the original petition or the right to recover under the Kansas statutes.

In all of the cases cited by counsel for defendant in error, upon this phase of the case (most of which are **Removal Cases**) the Federal question or the Act of Congress relied upon was introduced as a matter of defense by the defendant, or were not a necessary ingredient of plaintiff's case even though incidentally brought in by the plaintiff. In the case at bar, the Federal Employers' Liability Act was relied upon and made the basis for recovery in the amended petition of the defendant in error, and was in the case from its threshold.

In American Sugar Refining Co. v. New Orleans, 181 U. S., *l. c.* 281, this Court said:

> "As, however, a case so arises **where it appears on the record, from plaintiff's own statement, in**

legal and logical form, such as is required by good pleading, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction or application of the Constitution, or some law, or treaty of the United States, Gold Washing & Water Co. v. Keyes, 96 U. S. 199; Blackburn v. Portland Gold Mining Co., 175 U. S. 571; Western Union Telegraph Co. v. Ann Arbor Railroad Company, 178 U. S. 239; and as those cases fall strictly within the terms of section five, the appellate jurisdiction of this court in respect of them is exclusive.

"If plaintiff, by proper pleading, places the jurisdiction of the Circuit Court on diverse citizenship, and also on grounds independent of that, a question expressly reserved in Colorado Central Mining Co. v. Turek, 150 U. S. 138, and the case taken to the Court of Appeals, propositions as to the latter grounds may be certified, or, if that course is not pursued and the case goes to judgment (and the power to certify assumes the power to decide), an appeal or writ of error would lie under the last clause of section six, because the jurisdiction would not depend solely on diverse citizenship. Union Pacific Railway Company v. Harris, 158 U. S. 326."

In Bankers' Casualty Company v. Railroad, *supra*, the Court looked to the amended complaint to determine whether or not the jurisdiction of the court below was dependent wholly upon diversity of citizenship or upon the Constitution or laws of the United States. And in the case of Third Street & Suburban Ry. Co. v. Lewis, 173 U. S. 460, this Court held that it was proper to look to a supplemental bill to determine whether or not the jurisdiction of the lower court was based en-

tirely upon diversity of citizenship or upon some Federal question. It is true that in this last case the Court determined from a reading of the supplemental bill that while a Federal question was incidentally developed, that it was no essential part of the plaintiff's case. But, certainly, in the case at bar this Court cannot hold that the Federal Employers' Liability Act was only incidentally referred to by plaintiff and is and was not a necessary part of her amended petition upon which the trial was had and upon which she recovered.

In Chicago Junction Railway Company v. King, *supra*, it was held that a suit based upon the Federal Safety Appliance Act was a suit based upon a statute of the United States and gave this Court jurisdiction on writ of error to the Circuit Court of Appeals.

In Warner v. Searle & Hereth Co., *supra*, it was held:

> "In the present case diverse citizenship and the requisite amount existed, and the Circuit Court therefore had jurisdiction. But it is argued that the jurisdiction depended entirely upon diversity of citizenship, and hence that the decision of the Circuit Court of Appeals is final. We think, however, that an infringement of a trade-mark registered under the act was charged, and the averments of the bill, though quite defective, were sufficient to invoke the jurisdiction also on the ground that the case arose under the laws of the United States, and will not therefore dismiss the appeal."

In Henningsen v. U. S. Fidelity & Guaranty Co., *supra*, this Court said:

> "A motion is made to dismiss on the ground that

the jurisdiction of the Circuit Court was invoked solely on the ground of the diversity of citizenship of the parties, and hence the decree of the Circuit Court of Appeals was final. The motion must be overruled. Diversity of citizenship was, it is true, alleged in the bills, but grounds of suit and relief were also based on the statutes of the United States, as from the discussion of the merits will be seen. Those statutes entered as elements into the decision of the Circuit Court of Appeals, and were necessary elements. Howard v. United States, 184 U. S. 676; Warner v. Searle & Hereth Co., 191 U. S. 205."

We desire to call the Court's attention to the proposition that in her first amended original petition defendant in error predicates her cause of action on the Federal statute as well as the Kansas statute. Of course, it would be idle to consume time in discussing the proposition that she could not maintain this cause of action under the Kansas death statute, but independent of this allegation this Court and all Federal tribunals take notice of the Federal Employers' Liability Act and the scope of its provisions. When defendant in error alleged, in asserting her cause of action, that the deceased was a railroad employe engaged in interstate commerce, that plaintiff in error was a railroad corporation engaged about such commerce, and while so engaged that the deceased met his death, immediately all the questions arising as to the rights of the parties to the cause of action necessarily turn on the construction of that Federal statute. As to whether, as contended by defendant in error in this case, when Congress provided that a cause of action arising under this Federal statute should be asserted in the courts by a personal representative of the de-

ceased was a mere, idle, meaningless provision, and when plaintiff in error in opposition thereto contended that it was a provision that Congress intended should be complied with, at least substantially, the determination of that contention involved the construction of the Federal statute. The contention that the bringing of a suit for damages for injuries resulting in death by the next of kin, and thereafter when more than two years had elapsed since the death had occurred the filing of an amendment by the personal representative of the deceased was a compliance with the provision of the Federal Employers' Liability Act that required the suit to be instituted by a personal representative within two years of necessity involved the construction of that Federal statute, and we feel that it is idle to consume time further to show that the jurisdiction of this Court is ample, full and complete, and that the questions here presented are of dignity, are new, have never been passed on in this court, and that the same should not be disposed of thus summarily on a motion to dismiss.

From the foregoing, we submit that there is no merit in the contention that this Court is without jurisdiction.

Coupled with the motion to dismiss, however, is the **usual motion to affirm,** "on the ground that it is manifest that the writ or appeal was taken for delay only, or that the questions on which the decision of the cause depend are so frivolous as not to need further argument". There is nothing in the record or in the brief of counsel for defendant in error to show that the writ was taken for **delay only,** or that the questions on which the decision of the cause depend are **so frivolous** as not to need **further argument.** On the contrary the record

shows that the questions at issue are meritorious, and have not heretofore been decided by this Court. We submit that the record clearly shows a case which justifies extended argument, and that the case should not be even "transferred for hearing to a summary docket" as provided in the rules of this Court promulgated December 22, 1911.

BRIEF ON THE MERITS.

We have quite fully covered the merits of the controversy in the foregoing brief on the motion to dismiss, and we respectfully ask the Court, in addition to what we here say upon the merits, to carefully consider our brief on the motion to dismiss as well, the question of the jurisdiction of the Court and the merits of the controversy being necessarily much the same in this case.

We claim that the cause of action sued upon in the amended petition was based upon and claimed a right of recovery under, and that a recovery was had under the Federal Employers' Liability Act, although the suit by the terms of the Act was clearly barred. The Court had jurisdiction by reason of the plaintiff's asserting, claiming and recovering under the Federal Employers' Liability Act, which is the only act under which a recovery could be had—this is the jurisdictional question—although the cause of action, if any, under the Federal Employers' Liability Act was clearly barred—this is the merit of the controversy.

I.

FIRST ASSIGNMENT OF ERROR.

Said Circuit Court of Appeals erred in not sustaining the eleventh assignment of error upon the record in said cause, which is as follows:

The Court erred in refusing defendant's requested instruction No. 1, as follows:

1. In this cause you are instructed to return a verdict for the defendant (Rec., pp. 85-6).

It will be observed that there are points of differ-

ence between the Kansas and the Federal death statutes. Under the Kansas statute the cause of action arises to the personal representative of deceased, or, in the absence of such, to the next of kin, while under the Federal statute the cause of action arises to the personal representative of the deceased alone; under the Kansas statute the recovery is limited to ten thousand dollars, while under the Federal statute there is no limit; under the Federal statute there is a new rule with reference to contributory negligence, and under the Kansas law the common-law rule of contribuory negligence prevails.

Mo. Pac. Ry. Co. v. McCally, 41 Kas. 639.

There is a difference in the rules as to assumed risk. There are differences as to beneficiaries, and other differences exist between the Federal and Kansas statutes.

1. **The cause of action asserted in the original petition is based on the Kansas statute giving a cause of action for injuries resulting in death.**

That the plaintiff in the original petition bases her right to recover on the Kansas death statute is beyond question. She alleges that the accident happened in Kansas and that deceased was temporarily working in that State, and further specially refers to the laws of Kansas as giving her a right of action, and states facts showing her authority, under such laws, to institute the suit in the capacity in which she sued.

Defendant in error sued in the manner authorized by the State laws and did not sue in the capacity of personal representatives, which was necessary under the Federal Act. Defendant in error not only first sued in the capacity authorized by the Kansas statute and

not in the capacity required by the Act of Congress, but she specifically based her cause of action on the Kansas statute and not on the Federal Act.

2. **The amended petition asserts a cause of action in defendant in error under the Act of Congress approved April 22, 1908, known as the Federal Employers' Liability Act.**

In the amended petition filed January 6, 1911, defendant in error alleges that plaintiff in error has various lines of railroad within the States of Kansas, Oklahoma and Texas (Rec., p. 5); that at the time of his death the deceased, Fred S. Wulf, was in its employment as locomotive fireman, running **between Parsons in the State of Kansas, and Osage,** in the State of Oklahoma (Rec., p. 6); that she was his next of kin, and had been duly appointed temporary administratrix of the estate of the deceased (Rec., p. 6); **and that under the acts of Congress a right of action exists for her benefit because of his death** (Rec., p. 8).

These allegations state a case under the Employers' Liability Act, and it clearly was the intention of defendant in error to bring herself under its terms.

3. **So much of the defendant in error's first amended original petition as alleges a cause of action in her as administratrix under the Federal Employers' Liability Act, alleges a new cause of action and there is a departure from law to law.**

In determining whether there has been a departure in pleading or whether an amendment sets up a new cause of action the Court will look alone to the pleadings.

Metropolitan Life Ins. Co. v. People, 209 Ill. 42, 70 N. E. 643;
Katy v. Hart, 60 Kan. 684, 57 Pac. 938;
Haley v. Hobson, 68 Maine 167.

The decision of the Union Pacific Ry. Co. v. Wyler, 158 U. S. 285, rendered by the present Chief Justice, is decisive of the proposition here asserted. In that case the original petition alleged damage for personal injuries received by the negligence of the railway company in employing and retaining a fellow servant who was known to be incompetent, by means of whose incompetency and negligence a heavy iron dump was permitted to fall upon the plaintiff. The amendment counted upon the negligence of the same fellow servant and the statute of Kansas, which clearly charges railway corporations with the negligence of a fellow servant of an employe. The original petition counted upon the liability of the railway company under the common law, the amendment upon the liability under the Kansas statute. Both causes of action were based on the same transaction and resulted from the same facts. In the Wyler case the departure in the amendment was from the common law to the Kansas statute. In the case under consideration the departure in the amendment is from the Kansas statute to the Federal statute. In determining that the amendment in the Wyler case set up a new cause of action, Justice White says:

> "The legal principles by which this question must be solved are those which belong to the law of departure, since the rules which govern this subject afford the true criterion by which to determine the question whether there is a new cause of action in case of an amendment. In many of the States which have adopted the code system great latitude has been allowed in regard to amendment; but even in those States it is held that the question of what constitutes a departure in an amended pleading is nevertheless to be de-

termined by the rules of common law, which thus furnish the test for ascertaining whether a given amendment presents a new cause of action even although it be permissible to advance such new cause, by way of amendment.

Chitty on Pleading, pp. 674, 675, states the principle as follows:

'A departure may be either in the substance of the action or defense, or the law on which it is founded; as if a declaration be founded on the common law, and the replication attempt to maintain it by a special custom, or act of Parliament.' "

After referring to many English and American authorities and cases in harmony with the doctrine quoted from Chitty, he proceeds:

"The question then is, does the second amended petition state a new cause of action, so as to amount to a departure? In examining this question we must bear in mind what is the common and general law governing the relation of master and servant, which prevails also in Missouri. By this law a servant cannot recover from a common master for injuries suffered from the negligence of a fellow servant. However, where the master knowingly employs an incompetent servant, or where he keeps a servant in his employ after he has acquired knowledge of his incompetency, he is liable for damages caused to a fellow-servant, resulting from such incompetency. The statute of the State of Kansas which makes employers operating a railroad liable to one servant for the neglect of another without regard to the rule of incompetency, as above stated is clearly in derogation of the general law, which, as we have said,

prevails in Missouri where the action was originally brought.

"The first petition manifestly proceeded exclusively on that part of the general rule which holds the master liable who with knowledge employs or retains an incompetent servant. It made no reference to the Kansas statute, and did not directly aver negligence on the part of the fellow servant, except, in so far as this might be inferred from the averment of his incompetency. The language is 'that at the said time Kline was wholly incompetent and unfit for the position he occupied and the work he performed; that said incompetency was wholly unknown to the plaintiff at the said time, though well known to defendant, and defendant negligently and wrongfully kept and retained said Kline in its employ with full knowledge of his incompetency'. In fact when it charges the cause of the injury, the petition seems to eliminate all pretense of a right to recover because of the fellow servant's negligence, as distinguished from his incompetency, by resting the right upon the latter, for it says: 'While engaged in such business and without fault on the part of the plaintiff and through the negligence and mismanagement of defendant in retaining and employing said Kline after knowing of his incompetency, the said heavy iron dump was carelessly thrown and let fall'.

"It seems impossible to conceive of language which could more directly rest the cause of action on the general or common law of master and servant. And that this was the reliance is shown by the fact that when a demurrer to the petition was sustained, the amended petition for the first time specially added to the charge of incompetency of the fellow-servant an unequivocal averment of his negligence. A suit based upon a cause

of action alleged to result from the general law of master and servant was not a suit to enforce an exceptional right given by the law of Kansas. If the charge of incompetency in the first petition was not *per se* a charge of negligence on the part of the fellow-servant, then the averment of negligence apart from incompetency was a departure from fact to fact, and, therefore, a new cause of action. Be this as it may, as the first petition proceeded under the general law of master and servant, and the second petition asserted a right to recover in derogation of that law, in consequence of the Kansas statute, it was a departure from law to law. This conclusion is strengthened by the fact that in most of the States the laws of other States are treated as foreign laws, which must be pleaded and proven.

"The suit here was brought in a Missouri court, and was necessarily controlled by the law of that State.

"It is argued, however, that as all the facts necessary to recovery were averred in the original petition, the subsequent amendments set out no new cause of action in alleging the Kansas statute. If the argument were sound it would only tend to support the proposition that there was no departure or new cause of action from fact to fact, and would not in the least meet the difficulty caused by the departure from law to law. Even though it be conceded that all the facts necessary to give the right to recovery were contained in the original petition, as this predicated the assertion of that right on the general law of master and servant, and not upon the exceptional rule established by the Kansas statute, it was a departure from law to law. The most common, if not the invariable, test of departure in law, as settled by the authorities referred to, is a change from the

assertion of a cause of action under the common or general law to reliance upon a statute giving a particular or exceptional right. It is true that the Federal courts take judicial notice of the laws of the several States.

"This rule, however, does not affect the present suit, which was commenced in the court of Missouri. Moreover, the departure which arises from relying, first, upon the general or common law, and in the second instance, on an exceptional statute, is a question of pleading and is not controlled by the law in regard to judicial notice of statutes, which is a matter of evidence. The very origin of the rule in regard to departure from law to law makes this obvious. The English courts, from which our doctrine upon this subject is derived, necessarily take judicial notice of acts of Parliament, yet there a departure is made and a new cause of action is asserted when a party who has as first relied upon the common law afterwards rests his claim to recover upon a statute."

The Wyler case is cited and approved in United States v. Dalcour, 203 U. S. 423; T. & N. O. R. R. Co. v. Miller, 221 U. S. 408; Boston & M. R. R. v. Hurd, 108 Fed. 124; Whalen v. Gordon, 95 Fed. 308.

Voluminous, indeed, are the authorities holding that an amendment alleging new facts as a basis of action constitutes a departure from fact to fact and a new cause of action, but inasmuch as we rely on the **PROPOSITION** that the amendment sets up a different law, and for that reason sets up a new cause of action, we will content ourselves with the citation of the following authorities that directly sustain that proposition:

Hurst v. Detroit City Ry. (Mich.), 48 N. W. 44;
Walker v. Hester, 9 Kan. App. 201, 59 Pac. 662;

Railroad Co. v. Schroeder, 56 Kan. 731, 44 Pac. 1093;
Wingert v. Carpenter, 101 Mich. 395, 59 N. W. 662;
Parmlee v. Savannah Ry. Co., 78 Ga. 239, 2 S. E. 686;
Despeaux v. Pennsylvania R. Co., 133 Fed. 1009;
Wiley v. Yale, 1 Met. 553;
Melvin v. Smith, 12 N. H. 462;
Kansas City v. Hart, 60 Kan. 684, 57 Pac. 938;
Hansberger v. Pacific R. Co., 43 Mo. 196;
Exposition Cotton Mills v. W. & A. R. Co., 83 Ga. 441, 10 S. E. 113;
Holliday v. Jackson, 21 Mo. App. 660;
Gillam v. Life Ins. Co., 121 N. C. 369, 28 S. E. 470;
Fairchild v. Dunbar Furnace Co., 128 Pa. 485, 18 Atl. 443;
Newton v. Allis, 12 Wis. 378.

While we submit that the authorities cited, with which we have found none in conflict, are conclusive, still we will test the proposition by the rule usually applied in cases where it is claimed there is a new cause of action by reason of new facts set up.

In the well-considered cause of Phoenix Lumber Company v. Houston Water Company, 94 Tex. 462, 61 S. W. 707, the Supreme Court of Texas having under consideration the proposition of whether an amendment set up a new cause of action, says:

> "It is not sufficient that the causes of action be similar in their nature, but they must be essentially identical. Four tests are laid down by which to determine the identity of the causes of action: (1) Would a recovery had upon the original bar a recovery under the amended petition? (2) Would the same evidence support both of the pleadings?

(3) Is the measure of damages the same in each case? (4) Are the allegations of each subject to the same defense? 1 Am. and Eng. Enc. of Pl. and Pr., p. 556. We are of the opinion that the second and last furnish the best tests by which to determine the matter before us, and we can safely say that if the same testimony would not support the allegations in each of these pleas, and that the same defenses could not be interposed to each of them they are not identical, and therefore the amended petition presents a new cause of action."

Tried by these rules, under the original petition, it was necessary in order to recover for defendant in error to show that deceased was in the employ of the railway; that he was killed in Kansas, by reason of the negligence of the railway company, and that of his fellow servants. Under the amendment it was necessary in addition to show that the railway was engaged in interstate commerce, and that deceased was engaged about the same. Under the former a recovery could be had, but not for exceeding ten thousand dollars, while under the latter no limit was placed on the amount of the recovery. From the standpoint of plaintiff in error and its defenses, the difference is more marked. Under the original petition, showing that the railway was engaged in interstate commerce, and that deceased was working about the same when killed, was a complete answer to the cause plead; contributory negligence of the deceased was a complete defense and the common-law doctrine of assumed risk was available. Under the amendment the doctrine of comparative negligence, and the doctrine of assumed risk was greatly modified and the amount that plaintiff in error might have been

called on to pay, was without limit, at least so far as the law was concerned.

The fact that defendant in error could have recovered more under the amendment would constitute a new cause of action.

Atlanta K. & N. Ry. Co. v. Hooper, 92 Fed. 820.

4. The cause of action alleged by the defendant in error in her first amended original petition under the Federal Employers' Liability Act was barred by limitation at the time said amendment was filed, the same not having been filed within two years after the cause of action accrued.

It is conceded that under the provisions of the Federal statutes and the statutes of the various states, that amendments of pleadings are allowed with great liberality, and so long as such amendments consist in stating the same cause of action in a different way by a legal fiction they relate back to the filing of the original petition.

But equally well settled is the further proposition that if the amended petition sets up a cause of action new, different and distinct from that originally set up, there is no relation back and the statute of limitation runs against the new cause of action until it is introduced.

This principle is as firmly anchored in the law as the one first stated.

Sicard v. Davis, 6 Pet. 124;
Texas & P. R. Co. v. Cox, 145 U. S. 593;
Union P. Ry. Co. v. Wyler, 158 U. S. 289;
United States v. Dalcour, 203 U. S. 423;
T. & N. O. R. R. Co. v. Miller, 221 U. S. 408;
Boston & M. R. R. v. Hurd, 108 Fed. 124;
Whalen v. Gordon, 95 Fed. 308;

Nelson v. First National Bank, 139 Ala. 578, 36 So. 707;
Shepherd v. Southern Pine Co., 118 Ga. 252, 45 S. E. 220;
Davis v. New York L. E. & W. R. Co., 110 N. Y. 646, 17 N. E. 733;
Gorman v. Judge, 27 Mich. 138;
Grier v. Northern Assur. Co., 183 Pa. 334, 39 Atl. 10;
Scoville v. Glasner, 79 Mo. 449.

The same rule prevails in Kansas where the cause of action arose.

Atchison T. & S. F. R. Co. v. Schroeder, 56 Kan. 781, 44 Pac. 1093;
Kansas City v. Hart, 60 Kan. 684, 57 Pac. 938.

The same rule obtains in Texas, where the case was tried.

Phoenix Lumber Co. v. Houston Water Co., 94 Tex. 463, 61 S. W. 707;
McLane v. Belvin, 47 Tex. 493;
Bigham v. Talbott, 63 Tex. 271;
Railway v. Pape, 73 Tex. 502;
Railway v. Scott, 75 Tex. 84;
Cotton v. Rand, 93 Tex. 24.

The statutes of limitation are statutes of repose, and in view of the policy that inspired them the courts look with favor on rights arising under them.

Nelson v. First National Bank, 139 Ala. 578;
Gorman v. Judge, 27 Mich. 138.

The case of Union Pacific Ry. Co. v. Wyler, *supra*, is very much in point in this connection. We quote again from that opinion, and as follows:

"The general rule is, that an amendment relates

back to the time of the filing of the original petition, so that the running of the statute of limitations against the amendment is arrested thereby. But this rule, from its very reason, applies only to an amendment which does not create a new cause of action. The principle is, that, as the running of the statute is interrupted, by suit and summons, so far as the cause of action then propounded is concerned, it interrupts as to all matters subsequently alleged, by way of amendment, which are part thereof. But where the cause of action relied upon, in an amendment, is different from that originally asserted, the reason of the rule ceases to exist, and hence the rule itself no longer applies.

The doctrine on this subject is stated in the case of Sicard v. Davis, 6 Pet. 124. There the plaintiff brought an action of ejectment, in which he laid his demise as having been made by Steven Sicard on January 30, 1815, and at the November term of the court in 1821 he was given leave to amend by laying his demise in the name of the heirs of the original grantee of the lands, Joseph Phillips and others, to whom the land had been conveyed before the execution of the deed under which Sicard acquired his title. This Court, speaking through Chief Justice Marshall, said that 'limitations might be pleaded to the second allegation, though not to the first, because the second count in the declaration being on a demise from a different party asserting a different title, was not distinguishable, so far as respects the bar of the act of limitations from a new action'.

The text writers have uniformly recognized this principle. In Wood on Limitations of Actions, p. 14, note 4, it is said: 'If, however, a new declaration or complaint is filed setting up a new cause of action, the statute runs until such new declaration is filed, and may be pleaded thereto.'

See also Buswell on Limitations, p. 515. In Mohr v. Lenle, *supra*, the Alabama court thus speaks:

> 'The latitude of amendment allowed the plaintiff cannot be permitted to work injustice to the defendant, or to deprive him of any just and rightful defense. The plaintiff may introduce a new cause of action by amendment; but such amendment cannot have relation to the commencement of the suit, so as to avoid the bar of the statute of limitations, if the statute would operate a bar to a new suit commenced for that cause of action, at the time of making the amendment. The whole doctrine of relation rests in a fiction of law, adopted to subserve and not to defeat right and justice. When the amendment introduces a new right, or new matter, not within the *lis pendens*, and the issue between the parties; if at the time of its introduction, as to such new right or matter, the statute of limitations has operated a bar, the defendant may insist upon the benefit of the statute, and to him it is as available, as if the amendment were a new and independent suit.'

Other applications of the doctrine may be found in the following cases: Toby v. Allen, 3 Kan. 399; Hiatt v. Auld, 11 Kan. 176; Rolling Mill v. Monka, 107 Ill. 340; Crofford v. Cotharn, 2 Sneed 492; Flatley v. M. & C. Railroad, 9 Heiskell 230; Dudley v. Price's Administrator, 10 B. Mon. 84; Buntin v. C. R. I. & P. R., 41 Fed. Rep. 744; A. & P. Co. v. Laird, 58 Fed. 760."

In Whalen v. Gordon, 95 Fed. 308, where a contention like the one here made was sustained, the Court, speaking through Judge Sanborn, said:

"By the legal fiction of relation an amendment to a petition ordinarily takes effect as of the date of the commencement of the action. But this fiction always yields to the positive provisions of the statute and to the legal rights of the defendant. It is never permitted to deprive the adverse party of any legal defense to the claim presented by the amendment, such as that which arises by virtue of the provisions of the statute of limitations. A *lis pendens* prevents the running of the statute against a cause of action, but, where no suit is pending upon it, the statute continues to run against it. If no suit had been pending upon a given cause of action, and the statute had barred it, it would be a plain disregard or repeal of that statute to allow the cause of action to be ingrafted by amendment upon an action for another cause, which had been pending, and thus to revive by the fiction of relation that which was dead by law. In Gorman v. Judge, 27 Mich. 138, the Supreme Court of that State declared that 'to permit the shallow fiction of relation back to the commencement of the suit, under such circumstances, to nullify the act of the Legislature, would be discreditible to the judiciary'. In Dudley v. Price's Adm'r, 10 B. Mon. 84, 88, the Supreme Court of Kentucky said: 'If, during the pendency of the suit, any new matter or claim, not before asserted is set up and relied upon, the defendant has a right to insist upon the benefit of the statute until the time that the new claim is presented, because, until that time, there was no *lis pendens* as to that matter between parties.' The rule which governs the reciprocal effect of the doctrine of relation and the statute of limitations upon each other in the matter of amendments to petition, a rule which seems to be universally sustained by the authorities may be stated by these words: An amend-

ment to a petition which sets up no new cause of action or claim, and makes no new demand, but simply varies or expands the allegations in support of the cause of action already propounded, relates back to the commencement of the action, and the running of the statute against the claim so pleaded is arrested at that point. But an amendment which introduces a new or different cause of action, and makes a new or different demand not before introduced or made in the pending suit, does not relate back to the beginning of the action, so as to stop the running of the statute, but it is the equivalent of a fresh suit upon a new cause of action, and the statute continues to run until the amendment is filed."

5. **The Federal Employers' Liability Act superseded all local or State regulations as to causes of action coming within its terms, and since plaintiff in error was engaged in interstate commerce and the deceased, Fred S. Wulf, was employed by it in such commerce, at the time of his death, the cause of action, if any, growing out of his death was controlled by said act.**

Mondou v. New York, N. H. & H. R. Co., 223 U. S. 1.

The undisputed evidence shows that deceased met his death November 27, 1908. Plaintiff in error, by proper plea, plead that the cause of action was barred at the filing of defendant in error's first amended original petition.

From the foregoing it logically follows that:

6. **Plaintiff in error was entitled to an instructed verdict, the cause of action, if any, being controlled by the Federal Employers' Liability Act and more than two years having expired from the time the cause of**

action accrued until the amended petition setting it up was filed.

II.

SECOND ASSIGNMENT OF ERROR.

Said Circuit Court of Appeals erred in not sustaining the ninth assignment of error upon the record in said cause, which is as follows:

The Court erred in overruling the following exception of defendant to plaintiff's first amended original petition:

8. Defendant specially excepts to that portion of plaintiff's petition wherein it seeks to make the said Sallie C. Wulf administratrix of the estate of said Fred S. Wulf, deceased, a party plaintiff in this cause, for it appears that said deceased, Fred S. Wulf, was killed on the 27th day of November, 1908, and the amendment making the said Sallie C. Wulf administratrix, as aforesaid, party plaintiff herein, as appears in plaintiff's amended original petition filed in this cause January 6, 1911, the same being more than two years from the time the cause of action accrued in this case and the cause of action, if any, the said Sallie C. Wulf had on account of the death of the said Fred S. Wulf is barred by the limitation of two years (Rec., p. 85).

1. **An action for damages for injuries resulting in death under the Federal Employers' Liability Act can only be maintained by the administrator or the executor of the estate of the deceased person.**

Thompson v. Wabash R. Co., 184 Fed. 554;
Troxel v. Delaware L. & W. R. Co., 180 Fed. 874;
Adams v. Northern Pac. Ry. Co., 95 Fed. 938;
McCarty v. Railway, 62 Fed. 437;

Briggs v. Walker, 171 U. S. 466;
O'Neal v. Douthitt, 20 Pac. 495;
Oates v. Union Pac., 16 S. W. 487;
Walker v. O'Connell, 59 Kan. 306, 52 Pac. 894;
C. C. C. & St. L. Ry. Co. v. Osgood, 73 N. E. 294;
Yetton v. E. & I. Ry. Co., 33 N. E. 629;
Lovell v. DeBardelaben Coal Co., 7 Southern 756;
T. C. I. & R. Co. v. Herndon, 14 Southern 287;
Thornton, Employers' Liability, Section 73;
Reno, Employers' Liability Acts, Chapter 8.

In the enactment of the Employers' Liability Act of 1908 it is expressly provided that a cause of action thereby created in case of death of an employe is a cause of action to be asserted by a personal representative of the deceased, and it is our contention that this was not a mere idle provision of the statute to be regarded or disregarded by plaintiffs at their pleasure, but one to be observed in order to secure the benefits of that statute.

2. **There being no action at common law for damages for injuries resulting in death, such cause of action is covered by the provisions of the statute from which it arises, as to the right of recovery, as to the time within which the suit may be brought, and as to the parties that can maintain the suit.**

Dennick v. Ry., 103 U. S. 11;
Pollard v. Bailey, 20 Wall. 520;
Bank v. Francklyn, 120 U. S. 747;
Davidow v. Ry., 85 Fed. 943;
Walker v. O'Connell, 59 Kan. 306, 52 Pac. 894;
Boston & Maine R. R. v. Hurd, 108 Fed. 125;
L. E. & W. Ry. Co. v. Charmer, 67 N. E. 923.

3. **The substitution by an amended petition, of a**

personal representative, as plaintiff, in lieu of the beneficiary named as plaintiff in the original petition, in a cause of action arising under the Federal Employers' Lability Act is, as regards limitation, the commencement of a new suit, the statement of a new cause of action, and limitation runs against such cause of action until the amended petition is filed.

Armstrong v. Bean, 59 Tex. 492;
I. & G. N. R. R. Co. v. Howell, 111 S. W. 142;
Flatley, Administrator, v. Memphis & Charleston R. R. Co., 9 Heiskell (Tenn.) 230.

In the case of Armstrong v. Bean it was held that the filing of a paper designated an amended petition, wherein one not before a party to the suit sought to make himself plaintiff in lieu of the original plaintiff, was an irregularity, though filed with leave of the Court, and the defendant could not be required to answer the same until after service, as in an original suit.

In International & Great Northern R. R. Co. v. Howell *et al.*, petition was filed against a railroad company claiming damages for an alleged wrongful death without making the widow and minor child of deceased, parties. Afterwards an amendment was filed joining them as parties. The Supreme Court of Texas held that such amendment alleged a new cause of action and no judgment against defendant could be based thereon until after due service as in an original suit unless such service was waived by it.

The case of Flatley, Administrator, v. Memphis & Charleston R. R. Co., is, upon the facts, very much like the case at bar. There suit was filed against the railroad company by the widow of the deceased, under a

Tennessee statute giving a cause of action for injuries resulting in death, and afterwards by an amended petition the administrator of the estate of the deceased made himself plaintiff in lieu of the original plaintiff. The Court held that this substitution of parties might, under an article of the Tennessee code, be made, but that the right given by the death injury statute could be pursued in no other way than that provided therein, and that limitation run against the cause of action until the amendment substituting the administrator was filed.

In disposing of the question of limitation the Court said:

> "The question is, does this amendment relate back to the issuance of the original summons, and place the new plaintiff, in all respects, upon the same footing as if the summons had been originally issued in his name? For some purposes, no doubt, the amendment does relate back to the issuance of the original summons, but this doctrine of relation is mere fiction of law, and should not be applied so as to effect the rights of other parties."

The Court then discusses Nance, Lessee, v. Thompson, 1 Sneed, 221, and Crofford v. Cothran & Neil, 2 Sneed, 492, and continues:

> "To the same general effect are other authorities. And as to the right which a defendant has to the defense of the statute of limitations. See Girdner v. Stephens, 1 Heis. 280. This reasoning applies to the question here. The change of parties is as important as the change of the form of action. Previous to the amendment on the 1st of February, 1868, no suit had been brought for this

cause of action that could be maintained. The defense of the statute of limitations was complete. The Court had the power to allow a new plaintiff to be substituted, rather than compel the plaintiff to resort to the expense and delay of another summons; but in doing this the fiction of relation back to the original summons should not be allowed to defeat the defense of the statute of limitations, then perfect and complete."

III.

But it is contended by defendant in error that plaintiff in error, having filed its original answer to the merits without objecting to the party plaintiff, that it waived the right to now complain that the suit was not instituted as required by the provisions of the Federal Employers' Liability Act by a personal representative of the deceased, and the Circuit Court of Appeals sustains that contention by, in effect, holding that such objection should have been *in limine*. Defendant in error, in her original petition, based her suit, as we have contended, on the Kansas death statute.

Under these circumstances we respectfully submit that the demurrer of plaintiff in error should have been sutsained as it raised every question at the very outset as held by numerous authorities under the foregoing propositions and specially those under proposition IV of brief on motion to dismiss, p. . . , *supra*.

Under Lord Campbell's Act, every action thereunder was required to be commenced within twelve calendar months, and a similar provision is contained in nearly all of the State statutes, some limiting the time to one year and some to two years. These limitations differ in all respects from ordinary statutes of limitations, inasmuch as the act which creates the limitation also

creates the action to which it applies, and the limitation is not merely of the remedy but of the right of action itself. So strictly are these limitations in such statutes enforced that the right is given subject to the limitation, and even a subsequent change in the period of limitation will not extend the period so as to affect an existing right of action.

The Harrisburg, 119 U. S. 199;
Pittsburg, C. C. & St. L. Ry. Co. v. Hine, 25 Ohio St. 629;
Benjamin v. Eldredge, 50 Cal. 612;
Commonwealth v. Boston & W. R. Corp., 11 Cush. 512;
Commonwealth v. East Boston Ferry, 13 Allen 589.

Furthermore, the statute of limitations in these cases need not be pleaded, but it is incumbent upon the plaintiff to show by her own statement of facts that the suit was filed within the period fixed, and otherwise the petition is demurrable.

Hanna v. Jeffersonville R. R. Co., 32 Ind. 113;
Jeffersonville M. & I. R. R. Co. v. Hendricks, 41 Ind. 48;
George v. C. M. & St. P. Ry. Co., 51 Wis. 603.

These authorities show that our contention that the cause of action sued upon in the amended petition was barred is not a technical question, nor a frivolous one, but a meritorious one. There is no claim that it has ever been decided by this Court adversely to our contention. The questions presented by this record are new and novel ones, arising under the Federal Employers' Liability Act, and they should only be decided after full argument. As was said in Taylor v. Cranberry

I. & C. Co., 94 N. C. 525, where suit was brought under a State death statute:

> "Why the action was not brought within the time (required) does not appear, but any explanation in that respect would be unavailing, as there is no saving clause as to the time within which the action must be begun."

We respectfully submit that the objections were raised in time and are in no manner waived, as shown by the record in this case, but that the plaintiff in error's pleading is in due order.

IV.

From the foregoing it follows that the following assignments of error should be sustained:

Third Assignment of Error.

Said Circuit Court of Appeals erred in holding, in effect, that defendant in error's original petition was a suit brought under the provisions of the Federal Employers' Liability Act of 1908 (Rec., p. 86).

Fourth Assignment of Error.

Said Circuit Court of Appeals erred in holding that the amended petition filed by defendant in error related back to the original institution of this suit (Rec., p. 86).

Fifth Assignment of Error.

Said Circuit Court of Appeals erred in rendering judgment against plaintiff in error and in favor of said defendant in error, for costs of suit in said Court of Appeals (Rec., p. 86).

In conclusion, we respectfully submit that this case ought to be simply reversed.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1911.

NO. 933.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, PLAINTIFF IN ERROR.

VS.

SALLIE C. WULF, DEFENDANT IN ERROR.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR DEFENDANT IN ERROR ON MOTION TO DISMISS OR AFFIRM.

STATEMENT.

On January 23rd., 1909, defendant in error filed this suit in the Circuit Court of the United States for the Eastern District of Texas, at Sherman, to recover of the plaintiff in error damages for the death of Fred S. Wulf, who was killed near Parsons, Kansas, on November 27th., 1908, while engaged as a fireman on one of the locomotives of plaintiff in error hauling a freight train bound from Parsons in the State of

Kansas ,to Osage in the State of Oklahoma; said death being caused by the explosion of the boiler of the locomotive. Fred S. Wulf was unmarried, his father died before he did, and defendant in error, Sallie C. Wulf was his mother and sole beneficiary of whatever amount that might be recovered in said suit.

Plaintiff in error filed its original answer in said suit on May 19th., 1909, consisting of a general demurer, general denial, contributory negligence and assumed risk.

On January 6th., 1911, the plaintiff in error filed its first amended original answer, wherein, in addition to the matters set up in its original answer, it plead the fact that the cause of action arose under what is known as the Federal Employer's Liability Act, and that the suit must be brought by the persoanl representative of deceased.

On the 6th. day of January, 1911, defendant in error filed her first amended original petition wherein, in addition to the matters plead in her original petition, she sued also as personal representative of the estate of the deceased, and asked to recover in that capacity, as well as in her individual capacity.

On January 6th., 1911, defendant in error filed a motion requesting that she be allowed to prosecute the suit as personal representative of the estate of deceased, as well as in her individual capaciy.

On January 7th., 1911, the court entered an order granting said motion.

On January 9th., 1911, plaintiff in error filed its second amended original answer, and in addition to matters plead in its original and its first amended original answers it plead the statute of two years limitation, on the ground that more than two years had elapsed after the death of Fred S. Wulf before defendant in error made herself party plaintiff as personal representative of the deceased. Said matter of limitation appearing by demurrer, the court overruled the same.

On January 10th., 1911, a verdict and judgment was rendered in behalf of defendant in error in the sum of Seven Thousand Dollars.

A writ of error was sued out to the United States Circuit Court of Appeals for the Fifth Circuit, and that court affirmed the case on December 11th., 1911. From the judgment of said court, writ of error was sued out to the United States Supreme Court.

The question of liability was not raised in the United States Circuit Court of Appeals. The sole matter in issue was:

(a) as to whether or not the defendant in error had a right to bring the suit in her individual capacity, she being the sole beneficiary of whatever amount might be recovered; and if not, then

(b) as to whether or not the trial court had authority to permit her to make herself party plaintiff as personal representative of the estate of the deceased; and if so;

(c) as to whether or not the amendment as to parties took effect as of the date of the filing of the original petition, or as of the date of the filing of the amendment so as to bar the cause of action by the two years statute of limitation.

We will now quote the portions of the record necessary for the proper understanding of the matters in issue.

Plaintiff's original petition was as follows:

"The United States of America.
In the Circuit Court of the United States, for the Eastern District of Texas, at Sherman.
May Term, . D. 1909.
To The Honorable Judge of Said Court:

Sallie C. Wulf, hereinafter styled plaintiff, complaining of the Missouri, Kansas & Texas Railway Company, hereinafter styled defendant, represents that plaintiff is a bona fide inhabitant, resident and citizen of Grayson County, Texas, and that defendant is a corporation, duly incorporated and organized under the laws of the State of Kansas; that defendant has various lines of railway within the State of Kansas and Texas, including the County of Labette in the State of Kansas and the County of Grayson in the State of Texas; that George Stoner is local agent of said defendant, representing it in Grayson County, Texas.

For cause of action, plaintiff represents that heretofore, to-wit: On the 27th. day of November, A. D. 1908, Fred S. Wulf was in the employment of the defendant, in the capacity of fireman on its locomotives. That on said date he was in the due performance of his duties as such fireman, on train No. 433, locomotive No. 488, bound from Parsons in the State of Kansas to Osage in the State of Oklahoma. That when said train had proceeded about four miles upon its route, and while it was in Labette County, Kansas, without fault or negligence upon the part of the said Fred S. Wulf, the locomotive drawing said train, upon which the said Fred S. Wulf was riding, suddenly exploded,

blew up and gave way, thereby burning and scalding the said Fred S. Wulf, and throwing him with great force and violence from said locomotive a distance of about a hundred feet upon the ground and right-of-way there situate, so cruelly wounding, burning, bruising and mangling him as to cause his immediate death." (Rec. p. 1 and 2) * * *

(Then followed an allegation of the acts of negligence, the age and earning capacity of deceased.)

"Plaintiff is the mother of the said Fred S. Wulf, and is a *feme sole* and the said Fred S. Wulf was an unmarried man, leaving no wife or children surviving. That his father died prior to the time that he died, and plaintiff is the sole heir, next of kin, and beneficiary of the estate of the said Fred S. Wulf, deceased. That there is no administration pending on the said estate of the said Fred S. Wulf, within this state or elsewhere, and that none is necessary. That said decedent was a resident citizen of the State of Texas when he was killed, but was temporarily working in Kansas.

That by virtue of the laws of the State of Kansas, where the said Fred S. Wulf was killed, a right of action is provided by statute, for injuries resulting in death. The said Fred S. Wulf contributed all of his earnings to the support of plaintiff at the time of his death, and would have continued to have contributed his said earnings to plaintiff's support during the remainder of his life and the life of plaintiff. That plaintiff has a reasonable prospect of living 40 years longer.

That by reason of the premises, plaintiff has been damaged in actual damages in the sum of forty thousand ($40,000.00) Dollars.

Wherefore, plaintiff sues, and prays that defendant be cited to answer this petition, and upon final trial she have judgment for her damages and costs of suit." Filed Jan. 23, 1909. (Rec. 3 and 4).

DEFENDANT'S ORIGINAL ANSWER.

In The United States Court, Eastern District at Sherman, Texas.

Sallie C. Wulf,
vs. C. L. No. 111.
Missouri, Kansas & Texas Railway Company.

First. Defendant demurs generally to plaintiff's petition because the facts therein alleged show no cause of action.

Second. Defendant demurs specially to plaintiff's petition because: first, it is too general, vague and indefinite.

Third. Defendant for general answer to plaintiff's petition denies every allegation therein contained and demands strict proof thereof.

Fourth. Defendant for special answer to plaintiff's petition says that the injuries complained of, if any such were in fact sustained, were proximately caused and contributed to by deceased's own negligence and want of ordinary care and by that of his fellow servants. That said injuries, if any were received, resulted from one of the risks assumed by deceased. That of the said defects and causes which produced the injuries complained of, if any were produced, the deceased had full notice, or by the exercise of ordinary care on his part ,would have had full notice in ample time to have avoided the same.

Wherefore defendant prays to be discharged with the costs. Filed May 19th., 1909." (Rec. pp. 44 and 5).

DEFENDANT'S FIRST AMENDED ANSWER.

"In the Circuit Court of the United States for Eastern District of Texas, at Sherman.

Sallie C. Wolf,
vs. No. C. L. No. 111.
Missouri, Kansas & Texas Railway Company.

Now comes the defendant in the above cause, and by leave of the court first had and obtained, files this its first amended answer, and says:

I. Defendant demurs generally to plaintiff's petition, because the facts therein alleged show no cause of action.

II. Defendant demurs specially to plaintiff's petition, and says that said cause of action appears to be brought under the statutes of Kansas providing for a

recovery of damages on account of injuries resulting in death and alleges her damages at the sum $40,000.00, while plaintiff is not permitted, under the laws of Kansas, to recover in excess of $10,000.00 on such a cause of action.

III. Defendant demurs to the following paragraph in plaintiff's petition specially, to-wit:

> 'He (deceased) was a locomotive fireman with the reasonable prospects for a promotion to the position of locomotive engineer.'

Because the only materiality of such an allegation would be on the question of amount of recovery, and on that question the proposition of this promotion depended upon a great many contingencies, and was too specualtive to be considered in arriving at the damages sustrained by plaintiff.

IV. It appears from plaintiff's petition that at the time of the injury and death of F. S. Wulf, that defendant was engaged in Interstate Commerce between the States of Kansas and Oklahoma, and that deceased was in the employ of defendant at the time of his injury and death, and was himself engaged in Interstate Commerce between said states, and that said cause of action is not governed by the laws of Kansas.

V. Defendant specially demurs to plaintiff's petition on the ground that it appears from said petition that the cause of action, if any there is, arising from the death of F. S. Wulf, grows out of and depends upon an Act of Congress passed in 1908, known as the Federal Employers Liability Act, because at the time of the injury and death of F. S. Wulf, defendant was engaged in Interstate Commerce between the States of Kansas and Oklahoma, and the said F. S. Wulf was in defendant's employ and was himself engaged in such Interstate Commerce at the time of his injuries and death, and that such cause of action is governed by said Act of Congress passed in 1908, and arises to the personal representative of F. S. Wulf and not to the plaintiff in this case.

VI. Defendant for general answer to plaintiff's petition denies every allegation therein contained and demands strict proof. Except that at the time the said deceased was killed he was engaged in Interstate Commerce.

VII. Defendant for special answer to plaintiff's

petition says that the injuries complained of, if any such were in fact sustained, were proximately caused and contributed to by deceased's own negligence, and want or ordinary care, and of that of his fellow servants; that said injuries, if any were received, resulted from one of the risks assumed by deceased; that of the said defects and causes, which produced the injuries complained of, if any were produced, the deceased had full notice, and by the exercise of ordinary care on his part would have had full notice and ample time to have avoided the same. That at the time plaintiff was injured he was engaged in Interstate Traffic.

Wherefore, defendant prays to be discharged with its costs. Filed Jan. 6, 1911." (Rec. 9-11.)

PLAINTIFF'S FIRST AMENDED ORIGINAL PETITION.

"In the Circuit Court of the United States, for the Eastern District of Texas.

Sallie C. Wulf

vs. No. C. L. 111.

Missouri, Kansas & Texas Railway Company.

Now comes the plaintiff, Sallie C. Wulf, and after having obtained leave of the court, files this as her first amended original petition, amending her original petition filed herein January 23rd, 1909, and for such says:

That plaintiff is a *bona fide* inhabitant, resident and citizen of Grayson County, Texas, and was such at the time of the filing of this suit, and has so remained ever since. That defendant is a corporation duly incorporated and organized under the laws of the State of Kansas, and has various lines of railway within the States of Kansas, Oklahoma and Texas, including the County of Labette within the State of Kansas, and the County of Grayson within the State of Texas, and that the defendant has been duly served and filed its answer herein.

Plaintiff represents that she is the sole heir and next of kin of the hereinafter named Fred S. Wulf, deceased, and that at the time of the filing of the original petition herein there was no administration upon the estate of the said Fred S. Wulf, deceased, and no necessity for any. That on the 4th day of January, A. D.

1911, she was duly appointed temporary administratrix of the estate of the said Fred S. Wulf, deceased, by the County Court of Grayson County, Texas, a court of competent jurisdiction, and qualified as such and is now acting as such, with full power and authority to prosecute this suit as party plaintiff, and has made application to be appointed permanent administratrix at the ensuing term of said Probate Court for said purpose. That there now exists no necessity for an administration upon the estate of the said Fred S. Wulf, deceased, unless the same should be necessary for the sole purpose of prosecuting this suit as administratrix of said decedent for the benefit of herself as the surviving parent and next of kin of the said decedent; said plaintiff being the next of kin and sole beneficiary of whatever may be recovered in this suit. She therefore sues in her original capacity as such sole beneficiary and next of kin, but in the event it shall be determined that she is not entitled to recover in said capacity, then she asks that she be allowed to recover as administratrix for her benefit as aforesaid. Therefore she sues both in her individual capacity and as administratrix as aforesaid." * * *

(Then followed an allegation of the acts of negligence ,the age and earning capacity of deceased, etc.)

"That plaintiff is the mother of the said Fred S. Wulf, and is a feme sole, and that the said Fred S. Wulf was an unmarried man, leaving no wife or children surviving; that his father died prior to the time of his death, and that plaintiff is the sole surviving parent, heir, next of kin and beneficiary of his estate and of the amount recovered herein as hereinbefore alleged.

That said decedent was a resident citizen of the State of Texas when he was killed, but was temporarily residing in the State of Kansas at the time that he met his death, which occurred in said State of Kansas hereinbefore alleged.

That by virtue of both the laws of the State of Kansas, where the said Fred S. Wulf was killed, and the Acts of Congress of the United States of America, a right of action is provided for injuries resulting in death in the manner and form and in the occupation that deceased was engaged in at the time of his death.

That said decedent contributed all of his earnings

to the support of plaintiff at the time of his death, and would have continued to have contributed his said earnings to plaintiff's support during the remainder of his life and the life of plaintiff. That plaintiff has a reason-prospect of living 40 years longer. That whatever is recovered in this suit, whether individually or in a representative capacity, belongs, under the laws governing such matters, to plaintiff.

That by reason of the premises, plaintiff has been damaged in actual damages in the sum of forty thousand ($40,000.00) dollars.

Wherefore she sues, and defendant having duly answer herein, she prays that she recover her damages and costs of suit. Filed Jan. 6, 1911." (Rec. 5-8.)

DEFENDANT'S SECOND AMENDED ORIGINAL ANSWER.

"In the Circuit Court United States for the Eastern District of Texas, at Sherman.

Sallie C. Wulf,

vs. No. C. L. 111.

Missouri, Kansas & Texas Railway Company.

Now comes the defendant in the above cause, and by leave of the court first had and obtained, files this its second amended answer, and says:

I. Defendant demurs generally to plaintiff's first amended original petition, because the facts therein alleged show no cause of action.

II. Defendant demurs specially to plaintiff's petition and says that said cause of action appears to be brought under the statutes of Kansas provided for the recovery of damages on account of injuries resulting in death, and alleges here damages at the sum of $40,000.00 while plaintiff is not permitted under the laws of Kansas to recover in excess of $10,000.00 on such cause of action.

III. Defendant demurs to the following paragraph in plaintiff's petition specially, to-wit:

'He (deceased) was a locomotive fireman with the reasonable prospects for promotion to the position of locomotive engineer.'

Because the only materiality of such an allegation would be on the question of amount of recovery, and

on that question the proposition of promotion depended upon a great many contingencies and was too speculative to be considered in arriving at the damages sustained by plaintiff.

IV. It appears from plaintiff's petition that at the time of the injury and death of F. S. Wulf, that defendant was engaged in Interstate Commerce between the States of Kansas and Oklahoma, and that deceased was in the employ of defendant at the time of his injury and death, and was himself engaged in Interstate Commerce between the States of Kansas and Oklahoma, and was himself engaged in Interstate Commerce between the said States and that said cause of action is not governed by the laws of Kansas.
and that said cause of action is not governed by the laws of Kansas.

V. Defendant specially demurs to plaintiff's petition on the ground that it appears from said petition that the cause of action, if any there is, arising from the death of F. S. Wulf, grows out of and depends upon an Act of Congress passed in 1908, known as the Federal Employers Liability Act, because at the time of the injury and death of F. S. Wulf, defendant was engaged in Interstate Commerce between the States of Kansas and Oklahoma, and the said F. S. Wulf was in defendant's employ and was himself engaged in such Interstate Commerce at the time of his injury and death, and that such cause of action is governed by said Act of Congress passed in 1908, and arises to the personal representative of F. S. Wulf, and not to the plaintiff in this cause.

VI. Defendant specially excepts to that portion of said amended petition making the said Salile C. Wulf a party plaintiff in this cause, and shows that under the Act of Congress, known as the Employer's Liability Act, she is not a proper party to said suit.

VII. Defendant specially excepts to that portion of plaintiff's amended petition making Sallie C. Wulf temporary administratrix of the estate of said Fred S. Wulf, deceased, in this cause of action, because she was not made a party thereto as such administratrix at the time of the filing of the original petition in this cause.

VIII. Defendant specially excepts to that portion of plaintiff's petition wherein it seeks to make the the said Sally C. Wulf administratrix of the estate of said

Fred S. Wulf, deceased, a party plaintiff in this cause for it appears that said deceased, Fred S. Wulf, was killed on the 27th day of November, 1908, and the amendment making the said Sally C. Wulf administratrix, as aforesaid, party plaintiff herein, as appears in plaintiff's amended original petition filed in this cause January 6, 1911, the same being more than two years from the time the cause of action accrued in this case and the cause of action, if any, the said Sally C. Wulf had on account of the death of the said Fred S. Wulf is barred by the limititation of two years.

IX. Defendant for general answer to plaintiff's petition denies every allegation therein contained and demands strict proof, except that this defendant says that at the time the said deceased was killed he was engaged in Interstate Commerce.

X. Defendant for special answer to plaintiff's petition says that injuries complained of, if any such were in fact sustained, were proximately caused and contributed to by deceased's own negligence and want of ordinary care, in that the train upon which deceased was firing was a long heavy train going up grade and if deceased had exercised ordinary care for his own safety he could and would have discovered there was something wrong on account of the excessive escape of steam and could have left said engine in time to have escaped injury; that of the said defects and causes, which produced the injuries complained of, if any were produced, the deceased had full notice, and by the exercise of ordinary care on his part would have had full notice in ample time to have avoided the same; that at the time plaintiff was injured he was engaged in Interstate Traffic.

XI. Further specially answering herein this defendant says that the cause of action, if any there was, in the said Sally C. Wulf, administratrix of the estate of Fred S. Wulf, deceased, is barred by the two years' statute of limitation, and defendant here specially pleads said statute in bar of plaintiff's recovery. Filed Jan. 9, 1911." (Rec. 11-14.)

PLAINTIFF'S FIRST SUPPLEMENTAL PETITION

"In the Circuit Court of the United States for the

Eastern District of Texas.
Sallie C. Wulf,
vs. No. C. L. 111.
Missouri, Kansas & Texas Railway Company.

Now comes the plaintiff in the above styled and numbered cause, and by leave of the court files this as her first supplemental petition, and for such says:

1. She excepts to the defendant's second amended original answer, filed herein, and says the same is insufficient in law; and of this she prays the judgment of the court.

2. She specially excepts to that part of defendant's special demurrer contained in paragraph five of its answer in which it alleges that the plaintiff was not the proper party to file this suit, because said demurrer comes too late, in that defendant filed its original answer to the merits of this cause on May 19th., 1909, making no objections to parties, and thereby waived all objections to the filing of the suit by the said Sallie C. Wulf in her individual capacity; of which she prays the judgment of the court.

3. For special exception plaintiff demurs to all that portion of defendant's second amended original answer which undertakes to set up contributory negligence on the part of the deceased, because the same is vague, uncertain, indefinite, and states a conclusion, and fails to set out the specific acts of contributory negligence on the part of said deceased relied on by defendant; and of this she prays the judgment of the court.

4. For plea and answer herein plaintiff denies all and singular the allegations contained in said second amended original answer, except insofar as they are consistent with the allegations in plaintiff's first amended original petition.

5. For special plea and answer herein, plaintiff says that on the 19th day of May, 1909, defendant filed its original answer in this court, wherein it answered to the merits of this case, and made no exceptions or objections to the party plaintiff, or the capacity in which plaintiff filed this suit, whereby it waived any objections as to the proper party plaintiff to this suit, and thereby waived any and all objections to the fact that the said Salie C. Wulf originally filed this suit in her own name, in her individual capacity, as the sole

surviving parent, next of kin and beneficiary of the decedent; of all of which she puts herself upon the country. Filed Jan. 6, 1911." (Rec. 14 and 15.)

PLAINTIFF'S MOTION TO SUBSTITUTE PARTIES.

"In the Circuit Court of the United States for the Eastern District of Texas.

Sallie C. Wulf,
vs. No. C. L. 111.
M., K. & T. Railway Company.

Now comes the plaintiff in the above styled and numbered cause, and represents to the court that at the time she filed this suit there was no administration upon the estate of the decedent, Fred S. Wulf, and no necessity for any. That since the filing of said suit, to-wit: on the 4th day of January, 1911, the plaintiff has been appointed temporary administratrix of the estate of Fred S. Wulf, deceased, with full power to prosecute this suit as personal representative of the said Fred S. Wulf, deceased, and has asked that said administration be made permanent at the next term of the County Court. That under the laws governing such matters, the plaintiffl is the sole beneficiary of whatever amount that may be recovered in this suit; that the same constitutes no assets of the estate of the said Fred S. Wulf, deceased, but go directly to the plaintiff.

Wherefore plaintiff moves the court to allow her to amend and prosecute this suit to its final termination as the personal representative of the decedent, for her individual benefit as well as in her individual capacity, that there may be no doubt as to the proper party plaintiff to this suit under the law. Filed January 6, 1911." (Rec. 15-16.)

ORDER AUTHORIZING SUBSTITUTION OF PARTIES.

"On this the 6th day of January, A. D. 1911, came on to be heard plaintiff's motion to allow her to prosecute this suit as the personal representatice of Fred S. Wulf, deceased, as well as in her individual capacity,

and the same being considered by the court, is granted, and plaintiff is authorized to prosecute said suit, both in her individual capacity and as personal representative, she being the sole beneficiary of whatever amount is recovered." (Rec. 17.)

JUDGMENT AND VERDICT.

"January 10th, 1911.

Sallie C. Wulf,
vs. No. C. L. 111.
Missouri, Kansas & Texas Railway Company.

On this the 10th day of January, 1911, this cause coming on to be tried, all parties appeared in person and by attorney and announced ready for trial; whereupon came a good and lawful jury, towit: Tom E. Davis, foreman, and eleven others, who were duly empaneled and sworn and who, after hearing the evidence, the argument of counsel and the charge of the court, retired to consider of their verdict; and after due deliberation returned into open court the following verdict, to-wit:

January 10, 1911.

To the Honorable Circuit Court for the Eastern District of Texas:

We, the jury, in the case of Sallie C. Wulf against the M. K. & T. Railway Company find for Sallie C. Wulf, the plaintiff, a verdict for $7,000.00 cash money.

Tom Davis, Foreman.

It is therefore considered by the court and so ordered, adjudged and decreed, thatthe plaintiff, Sallie C. Wulf, in her individual capacity and as administratrix of the estate of Fred S. Wulf, deceased, do have and recover of the defendant, the Missouri, Kansas & Texas Railway Company, a corporation, the sum of seven thousand ($7,000.00) dollars, with interest thereon at the rate of 6 per cent per annum from this date, and all costs of suit for which let execution issue. The amount recovered herein shall be for the sole use and benefit of said Sallie C. Wulf, and the payment to her of said seven thousand dollars, together with interest and costs, as aforesaid, shall be a complete liquidation and settlement of said entire cause of action and shall acquit the defendant from further liability thereon." (Rec. 18.)

OPINION OF THE COURT.

"United States Circuit Court of Appeals, Fifth Circuit.
No. 2207.
Missouri, Kansas & Texas Railway Company,
Plaintiff in Error,
vs.
Mrs. Sallie C. Wulf, Defendant in Error.
Error to the Circuit Court of the United States for the Eastern District of Texas.

Before Pardee and Shelby, Circuit Judges, and Grubb, District Judge. By the Court:

Under the Kansas law as well as under the Federal Employers' and Liability Act, Mrs. Sallie C. Wulf was the sole beneficiary and entitled to all damages resulting from the negligent killing of her son, Fred S. Wulf, therefore in the absence of objections made *in limine* it was immaterial whether the suit to recover the said damages was prosecuted by Sallie C. Wulf individually, or by Sallie C. Wulf, administratrix of the estate of Fred S. Wulf, and this cause of action was not subsequently abandoned or changed by any amendment in the pleadings nor by the permission of the trial Court that the said Sallie C. Wulf might prosecute the suit individually and as administratrix of Fred S. Wulf; and as the suit was brought within two years from the death of said Fred S. Wulf the statutory bar under the Kansas law or under the Federal Employers' Liability Act was not well pleaded.

On the whole case we find no prejudicial error warranting a reversal. The judgment of the Circuit Court is

Affirmed. (Original filed Dec. 11, 1911.) (Rec. 80.)

FINAL JUDGMENT.

"No. 2207
Missouri, Kansas & Texas Railway Company.
vs.
Sallie C. Wulf.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Texas, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this court that the judgment of the said Circuit Court in this cause be, and the same is hereby affirmed.

It is further ordered and adjudged that the plaintiff in error, Missouri, Kansas & Texas Railway Company, and the surety on the writ of error bond herein, American Surety Company of New York, be condemned to pay the costs of this cause in this court, for which execution may be issued out of said Circuit Court. Dec. 11, 1911." (Rec. 80-81.)

PETITNON FOR WRIT OF ERROR.

"United States Circuit Court of Appeals for the Fifth Circuit. Missouri, Kansas & Texas Railway Company, Plaintiff in Error,

vs.

Sallie C. Wulf, Defendant in Error.

Your petitioner, the Missouri, Kansas & Texas Railway Company, plaintiff in error in the above entitled cause, respectfully shows that the above entitled cause is now pending in the United States Circuit Court of Appeals for the Fifth Circuit, and a judgment has therein been rendered on the 11th. day of December, A. D. 1911, affirming a judgment of the Circuit Court of the United States for the Eastern District of Texas, and the matter in controversy in said suit exceeds One Thousand ($1,000.00) Dollars, besides costs, and that the jurisdiction of none of the courts above mentioned is, or was, dependent in any wise upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of the different states, and that this cause does not arise under the patent laws, nor the revenue laws, nor the criminal laws, and that it is not an admiralty case, and that it is a proper case to be reviewed by the Supreme Court of the United States upon writ of error, and, therefore, your petitioner would respectfully pray that a writ of error be allowed it in the above entitled cause directing the clerk of the United States Court of Appeals for the Fifth Circuit to send the record and procedings in said cause with all things concerning the same, to the Supreme Court of the United States in order that the errors complained

of in the assignment of errors herewith filed by said plaintiff in error may be reviewed, and if error be found, corrected according to the laws and customs of the United States." (Rec. 81).

"The foregoing petition is granted and writ of error allowed as prayed for, upon plaintiff in error's giving a supersedeas bond, according to law, in the sum of Sixteen Thousand ($16,000.00) Dollars.

DON A. PARDEE,
Dec. 21st., 1911. Circuit Judge Fifth Circuit."
(Rec. 81-82)

"The foregoing has the following indorsement to-wit: No. 2207. Missouri, Kansas & Texas Ry. Co., Plaintiff in Error, vs. Sallie C. Wulf, Defendant in Error. Petition for writ of error filed 21 day of December, 1911. Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals.

United States of America, ss:

The President of the United States to the Honorable the Judges of the United States Circuit Court of Appeals for the Fifth Circuit, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of Appeals before you, or some of you, between the Missouri, Kansas & Texas Railway Company, plaintiff in error, and Sallie C. Wulf, defendant in error, a manifest error hath happened to the great damage of the said plaintiff in error, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 21st day of Decem-

ber, in the year of our Lord one thousand nine hundred and eleven."

"Allowed by

Don A. Pardee,

Circuit Judge, Fifth Circuit."

"It is hereby certified that a copy of this writ is this day lodged in the clerk's office for the use of the defendant in error, 21st. day of December, 1911.

(Seal United States Circuit Court of Appeals, Fifth Circuit.)"

(Endorsed:) No. 2207. Missouri, Kansas & Texas Ry. Co., Plaintiff in Error, vs. Sallie C. Wulf, Defendant in Error. Writ of Error. Filed 21 day of December, 1911. Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals." (Rec. 82-83).

BOND.

"Know all men by these presents: That we, the Missouri, Kansas & Texas Railway Company, a corporation incorporated under the laws of the State of Kansas, having a principal place of business in the City of Parsons, County of La Bete and State of Kansas, as principal, and American Surety Company of New York, a corporation organized and existing under and by virtue of the laws of the State of New York and having an office and regular place of business in the City of Sherman, County of Grayson, and State of Texas, as surety, are held and firmly bound unto Sallie C. Wulf in the full and just sum of Sixteen Thousand ($16,000.00) Dollars to be paid to the said Sallie C. Wulf, her certain attorneys, executors, administrators or assigns, to which payment well and truly to be made, the said principal and the said surety bind themselves, their and each of their successors and assigns, jointly and severally firmly by these presents.

Sealed with our seals and dated this 21st. day of December, in the year of our Lord nineteen hundred and eleven.

Whereas, lately in the Circuit Court of Appeals for the Fifth Circuit in a suit depending in said court between the Missouri, Kansas & Texas Railway Company, plaintiff in error, and Sallie C. Wulf, de-

fendant in error, a judgment was rendered against the said Missouri, Kansas & Texas Railway Company, and the said Missouri, Kansas & Texas Railway Company having obtained a writ of error, and filed a copy thereof in the clerk's office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Sallie C. Wulf citing and admonishing her to be and appear at a session of the Supreme Court of the United States to be holden at the City of Washington on the 20th. day of January, next.

Now the condition of the above obligation is such, that if the said Missouri, Kansas & Texas Railway Company shall prosecute said writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void, else to remain in full force and virtue." (Rec. 83).

"The foregoing has the following indorsement to-wit: No. 2207, Missouri, Kansas & Texas Ry. Co., Plaintiff in Error, vs. Sallie C. Wulf, Defendant in Error. Bond on Writ of Error, Filed 21 day of December, 1911. Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals." (Rec. 84).

ASSIGNMENT OF ERROR.

"United States Circuit Court of Appeals for the Fifth Circuit. The Missouri, Kansas & Texas Railway Company, Plaintiff in Error.

vs.

Sallie C. Wulf, Defendant in Error.

Now comes the plaintiff in error, The Missouri, Kansas & Texas Railway Company, by Head, Smith, Hare & Head, its attorneys, and says that in the record and proceedings aforesaid of the United States Circuit Court of Appeals for the Fifth Circuit in the above entitled cause, and in the rendition of the final judgment therein, manifest error has intervened to the prejudice of the said plaintiff in error in this, to-wit:

First. Said Circuit Court of Appeals erred in entering judgment affirming the judgment of the Circuit Court of the United States for the Eastern District of Texas for Seven Thousand ($7,000.00) Dollars, and interest at the rate of six (6) per cent. per annum from and after the 10th. day of January, A.

D. 1911, and costs of suit, entered on error in favor of said defendant in error and against said plaintiff in error.

Second. Said Circuit Court of Appeals erred in not reversing the said judgment of the United States Circuit Court aforesaid, and in not remanding said cause to said Circuit Court for a new trial.

Third. Said Circuit Court of Appeals erred in not sustaining the fifth assignment of error upon the record in said cause, which is as follows:

The court erred in overruling the following exception of defendant to plaintiff's first amended original petition:

4. It appears from plaintiff's petition that at the time of the injury and death of F. S. Wulf that defendant was engaged in interstate comemrce between the states of Kansas and Oklahoma, and that deceased was in the employ of defendant at the time of his injury and death, and was himself engaged in interstate commerce between the said states and that said cause of action is not governed by the laws of Kansas.

Fourth. The said Circuit Court of Appeals erred in not sustaining the sixth assignment of error upon the record in said cause, which is as follows:

The Court * * * in overruling the following exception of defendant to plaintiff's first amended original petition:

5. Defendant specially demurs to plaintiff's petition on the ground that it appears from said petition that the cause of action, if any there is, arising from the death of F. S. Wulf, grows out of and depends upon an Act of Congress passed in 1908, known as the Federal Employers' Liability Act, because at the time of the injury and death of F. S. Wulf defendant was engaged in interstate commerce between the states of Kansas and Oklahoma and the said F. S. Wulf was in defendant's employ and was himself engaged in such interstate commerce at the time of his injury and death, and that such cause of action is governed by said Act of Congress passed in 1908, and arises to the personal representative of F. S. Wulf and not the plaintiff in this cause.

Fifth. The said Circuit Court of Appeals erred in not sustaining the seventh assignment of error upon the record in said cause, which is as follows:

The court erred in overruling the following exception of defendant to plaintiff's first amended original petition:

6. Defendant specially excepts to that portion of said amended petition making the said Sallie C. Wulf a party plaintiff in this cause, and shows that under the Act of Congress, known as the Employer's Liability Act, she is not a proper party to said suit.

Sixth. Said Circuit Court of Appeals erred in not sustaining the eighth assignment of error upon the record in said cause, which is as follows:

The court erred in overruling the following exception of defendant to plaintiff's first amended original petition:

7. Defendant specially excepts to that portion of plaintiff's amended petition making Sallie C. Wulf temporary administratrix of the estate of Fred S. Wulf, deceased, in this cause of action, because she was not made a party thereto as administratrix at the time of the filing of the original petition in this cause.

Seventh. Said Circuit Court of Appeals erred in not sustaining the ninth assignment of error upon the record in said cause, which is as follows:

The court erred in overruling the following exception of defendant to plaintiff's first amended original petition:

8. Defendant specially excepts to that portion of plaintiff's petition wherein it seeks to make the said Sallie C. Wulf administratrix of the estate of said Fred S. Wulf, deceased, a party plaintiff in this cause for it appears that said deceased, Fred S. Wulf, was killed on the 27th day of November, 1908, and the amendment making the said Sallie C. Wulf administratrix, as aforesaid, party plaintiff herein, as appears in plaintiff's amended original petition filed in this cause January 6, 1911, the same being more than two years from the time the cause of action accrued in this case and the cause of action, if any, the said Sallie C. Wulf had on account of the death of the said Fred S. Wulf is barred by the limitation of two years.

Eighth. Said Circuit Court of Appeals erred in not sustaining the eleventh assignment of error upon the record in said cause, which is as follows:

The court erred in refusing defendant's requested instruction No. 1, as follows:

1. In this case you are instructed to return a verdict for the defendant.

Ninth. Said Circuit Court of Appeals erred in holding in effect that defendant in error's original petition was a suit brought under the provisions of the Federal Employers' Liability Act of 1908.

Tenth. Said Circuit Court of Appeals erred in holding that the amended petition filed by defendant in error related back to the original institution of this suit.

Eleventh. Said Circuit Court of Appeals erred in rendering judgment against plaintiff in error, and in favor of said defendant in error, for costs of suit in said Court of Appeals.

Wherefore, the said Missouri, Kansas & Texas Railway Company, plaintiff in error, prays that for the errors aforesaid, and other errors appearing in the record of said United States Circuit Court of Appeals in the above entitled cause to the prejudice of the plaintiff in error hte said judgment of the said United States Circuit Court of Appeals be reversed, annulled and held for naught esteemed, and that said cause be remanded to the United States Circuit Court for the Eastern District of Texas with instructions to grant a new trial in said case, or for such further proceedings in said cause as may be determined upon by this Honorable Court to the end that justice may be done in the premises." (Rec. 84-86).

"The foregoing has the following indorsements, to-wit: No. 2207. U. S. Circuit Court of Appeals. Missouri, Kansas & Texas Ry. Co., Plaintiff in Error, vs. Sallie C. Wulf, Defendant in Error. Assignment of Errors. Filed 21 day of December, 1911, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals." (Rec. 86).

"The United States of America:

The President of the United States to Sallie C. Wulf, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden at the City of Washington, D. C., within thirty days from date hereof, pursuant to a writ of error filed in the Clerk's Office of the Circuit Court

of Appeals of the United States for the Fifth Circuit and wherein The Missouri, Kansas & Texas Railway Company is Plaintiff in Error, and you are Defendant in Error, to show cause, if any there be, why the judgment rendered against the said Missouri, Kansas & Texas Railway Company, Plaintiff in Error, as in said writ mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward D. White, Chief Justice of th United States, this 21st. day of December in the year of our Lord one thousand nine hundred and eleven.

Don A. Pardee
Circuit Judge."
(Rec. 86)

MOTION TO DISMISS OR AFFIRM.

To The Honorable The Supreme Court of the United States:

Defendant in Error moves the court to dismiss this cause for want of jurisdiction, because:

1—The record discloses that the jurisdiction of the United States Circuit Court, before which this case was tried, was solely dependent upon the question of diverse citizenship, and the judgment of the United States Circuit Court of Appeals is final;

2—The record discloses that the suit of Defendant in Error did not involve the construction of a statute of the United States so as to invoke the jurisdiction of the Circuit Court by reason thereof and thereby authorize the Supreme Court to entertain jurisdiction of this cause;

3—The record discloses that the construction of

the Employers' Liability Act (if any was involved) was raised solely by the pleadings of the plaintiff in error; therefore, the jurisdiction of the Circuit Court would not depend on the same so as to authorize the supreme court to entertain jurisdiction of this cause.

In the event that this court holds that it has jurisdiction of this cause, and overrules this motion to dismiss same for want of jurisdiction, defendant in error moves the court to affirm said cause, because it is manifest that writ of error was taken for delay only, as the question upon which jurisdiction depends is so frivolous as not to need further argument.

BRIEF OF ARGUMENT.

I.

The jurisdiction of the United States Circuit Court in which this case was tried, depended upon diverse citizenship of the parties, and the judgment of the United States Circuit Court of Appeals affirming the judgment of the trial court is final.

At the time of the filing of the suit, defendant in error was a citizen of Grayson County, Texas, the county in which the City of Sherman is situated, and in which the suit was filed, and the plaintiff in error was a corporation duly incorporated and organized under and by virtue of the laws of the State of Kansas, and was, for the purpose of this suit, a citizen inhabitant and resident of the State of Kansas. This

was shown by the original petition of plaintiff (defendant in error). (Rec. 1).

Section 1. Act of March 3, 1875, Ch. 137, 18 Stat. L. 470, provides as follows:

> "That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum of two thousand dollars, * * * in which there shall be a controversy between citizens of different states; * * * where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

This suit was brought in the district where plaintiff resided, in accordance with said statute.

Sec. 6. Act of March 3, 1891, Ch. 517, 26 Stat. L. 826, provides as follows:

> "The judgments or decrees of the circuit courts of appeal shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit, or controversy, being aliens and citizens of the United States or citizens of different states."

The state courts had jurisdiction to try cases arising under the Federal Employers' Liability Act be

forer the amendment of 1910 giving the United States and state courts concurrent jurisdiction. Mondou vs. New York, etc., Ry. Co. decided by this court January 15th., 1912, reported in Advance Sheets of Opinions of the United States Supreme Court (published by Lawyers Co-op. Pub. Co.) No. 6 at page 177. Therefore the United States Circuit Court did not have jurisdiction of the case at bar because the right of action arose under a statute of the United States. Said jurisdiction depended solely on diverse citizenship.

II.

The pleadings of the plaintiff alone are looked to to determine the jurisdiction. If the original petition disclosed the fact that jurisdiction of the Circuit Court was invoked solely upon diverse citizenship of the parties to the suit, the judgment of the United States Circuit Court of Appeals is final, notwithstanding the defendant, by its answer, may invoke the construction of a Federal Statute.

The original petition of the plaintiff in this suit disclosed the fact that the deceased lost his life while acting in the capacity of a fireman hauling an interstate freight train. Suit was filed in the Circuit Court of the United States at Sherman, in Grayson County, the county of plaintiff's residence, against the defendant (plaintiff in error) who was a corporation organized under the laws of the State of Kansas. That

portion of the petition disclosing that fact is as follows:

"Sallie C. Wulf, hereinafter styled plaintiff, complaining of the Missouri, Kansas & Texas Company, hereinafter styled defendant, represents that plaintiff is a bona fide inhabitant, resident and citizen of Grayson County, Texas, and that defendant is a corporation, duly incorporated and organized under the laws of the State of Kansas; that defendant has various lines of railway within the State of Kansas and Texas, including the County of Labette in the State of Kansas and the County of Grayson in the State of Texas; that George Stoner is local agent of said defendant, representing it in Grayson County, Texas." (Rec. 1).

The defendant, on January 6th., 1911, more than two years after the original suit was filed, in its first amended original answer, raised the construction of a Federal statute (if such it may be called) as follows:

"IV. It appears from plaintiff's petition that at the time of the injury and death of F. S. Wulf, that defendant was engaged in Interstate Commerce between the States of Kansas and Oklahoma, and that deceased was in the employ of defendant at the time of his injury and death, and was himself engaged in Interstate Commerce between said states, and that said cause of action is not governed by the laws of Kansas.

V. Defendant specially demurs to plaintiff's petition on the ground that it appears from said petition

that the cause of action, if any there is, arising from the death of F. S. Wulf, grows out of and depends upon an Act of Congress passed in 1908, known as the Federal Employers' Liability Act, because at the time of the injury and death of F. S. Wulf, defendant was engaged in Interstate Commerce between the States of Kansas and Oklahoma, and the said F. S. Wulf was in defendant's employ and was himself engaged in such Interstate Commerce at the time of his injuries and death, and that such cause of action is governed by said Act of Congress passed in 1908, and arises to the personal representative of F. S. Wulf and not to the plaintiff in this case.

VI. Defendant for general answer to plaintiff's petition denies every allegation therein contained and demands strict proof. Except that at the time the said deceased was killed he was engaged in Interstate Commerce." (Rec. 9 and 10).

So that if it should be held that the construction of the Federal Employers' Liability Act was involved, such construction was invoked by the defendant and could not give the Supreme Court jurisdiction of this case.

That doctrine is laid down fully and clearly in the case of Colorado Consolidated Mining Co. vs. Truck, 150 U. S. at page 142 (37 L. Ed. 1032). We quote:

> "This complaint was filed December 2, 1885, and alleged the diverse citizenship of the parties as the ground of jurisdiction. But it is said that

the vital question raised in the case was whether the patentee of a lode claim, whose discovery and patent were later than the date of another's patent, may follow his junior patented lode, the apex thereof being within his side lines, into the other's patented ground on the dip; and that the solution of this question depended upon the construction and application of section 2322 of the Revised Statutes, concerning the dip and apex of lodes. Hence that the suit really and substantially involved a controversy only to be determined by reference to the Federal statute, and that jurisdiction existing on that ground and did not depend entirely upon the other.

To maintain this proposition, it is contended that reference may be made to the entire pleadings, the evidence, or the rulings of the courts below.

This view, however, ignores the settled doctrine that the inquiry, in cases such as this, into the jurisdiction of the circuit court, is limited to the facts appearing on the record in the first instance. This has often so held in the enforcement of the inflexible rule which requires this court in the exercise of its appellate power to deny the jurisdiction of courts of the United States in all cases where such jurisdiction does not affirmatively appear in the record on which it is called upon to act.

And we do not think we can do better in elucidation of the rule than quote from the opinion of the court in Metcalf v. Watertown, 128 U. S. 586 (32:543), where the subject is considered and the authorities cited:

'When, however, the original jurisdiction of a circuit court of the United States is invoked upon the sole ground that the determination of the suit depends upon some question of a Federal nature, it must appear, at the outset, from the declaration or the bill of the party suing, that the suit is of that character; in other words, it must appear, in that class of cases, that the suit was one of which the circuit court, at the time its jurisdiction is invoked, could properly take cognizance. If it does not so appear, then the court, upon demurrer or motion, or upon its own inspection of the pleading, must dismiss the suit; just as it would remand to the state court a suit when the record, at the time of removal, failed to show was within the jurisdiction of the circuit court. It cannot retain it in order to see whether the defendant may not raise some question of a Federal nature upon which the right of recovery will finally depend; and if so retained, the want of jurisdiction, at the commencement of the suit, is not cured by an answer or plea which may suggest a question of that kind.'

The jurisdiction of the circuit court was in-

voked, December 2, 1885, by the filing of the complaint, from which it appeared that the suit was one of which cognizance could be properly taken on the ground of diverse citizenship, but it did not appear therefrom that jurisdiction was rested, or could be assured, on any other ground. The Federal question now suggested did not emerge until the defendant set up its second defense, and not then unless deducible from the bare averment that it claimed under the senior discovery and patent, which was admitted in the replication.

The proposition that the right given by section 2322 of the Revised Statutes to the holder of the apex to follow his vein on its dip outside of the side lines of his claim is merely a right against an adjoining claimant holding under a junior patent or certificate was afterwards advanced in certain instructions requested by defendant and refused.

The jurisdiction had, however, already attached and could not be affected by the subsequent developments. It depended entirely upon diverse citizenship when the suit was commenced, and to that point of time the inquiry must necessarily be referred."

The same doctrine is laid down in the case of Ayers vs. Polsdorfer, 187 U. S. at page 588 (47 L. Ed. 315). We quote:

"A motion is made to dismiss on the ground

that the judgment of the circuit court of appeals was final, and therefore it is not reviewable by writ of error from this court.

Interpreting the judiciary act of 1891 (26 Stat. at L. 826, Ch. 517, U. S. Comp. Stat. 1901, p. 488), we said, in McLish v. Roff, 141 U. S. 661, 666, 35 L. ed. 893, 12 Sup. Ct. Rep. 118, that its purpose was to provide 'for the distribution of the entire appellate jurisdiction of our national judicial system between the Supreme Court of the United States and the circuit courts of appeals therein established, by designating the classes of cases in respect of which each of those two courts shall respectively have final jurisdiction.'

But special questions arose. It was provided in Sec. 6 that the judgments and decrees of the circuit court of appeals should be final in all cases in which *jurisdiction* was dependent entirely upon diversity of citizenship. What jurisdiction was meant, and what would be the effect if the Federal questions should appear in the proceedings after the commencement of the case? The questions were answered in Colorado Cent. Consol. Min. Co. v. Turck, 150 U. S. 138, 37 L. ed. 1030, 14 Sup. Ct. Rep. 35.

In that case the jurisdiction of the circuit court was invoked on the ground of diversity of citizenship, but the defendant claimed to have set up in defense a Federal question arising under

Sec. 2322 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 1425), and on that ground insisted that the judgment of the circuit court of appeals in the case was not final. Rejecting the contention and dismissing the writ of error, this court held that before the defense under Sec. 2322 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 1425) had been set up, jurisdiction had 'already attached, and could not be affected by the subsequent development; jurisdiction, it was said, 'depended entirely upon diverse citizenship when the suit was commenced, and to that point of time the inquiry must necessarily be referred.' "

The same doctrine is also laid down in the case of Arbuckle vs. Blackburn, 191 U. S., p. 413 (48 L. ed. p. 241):

"We are of the opinion that this appeal must be dismissed, because the jurisdiction of the circuit court was 'dependent entirely upon the opposite parties to the suit or controversy being citizens of different states', and the decree of the circuit court of appeals was final. Act of March 3, 1891, 26 Stat. at L. 826, Ch. 517, Sec. 6, U. S. Comp. Stat. 1901, p. 550.

The circuit courts have 'original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, ex-

clusive of interest and costs, the sum or value of two thousand dollars, and arising under the Constitution or laws of the United States, or treaties made or which shall be made, under their authority, * * * or in which there shall be a controversy between citizens of different states, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid, * * *' Act of March 3, 1887, 24 Stat. at L. 552, Ch. 373; act of August 13, 1888, 25 Stat. at L. 433, Ch. 866 U. S. Comp. Stat. 1901, p. 508.

In the present case the circuit court had jurisdiction on the ground of diverse citizenship; but it is now contended that jurisdiction also rested on the ground that the suit was one arising under the Constitution of the United States.

The rule is firmly established that a suit does not so arise unless it really and substantially involves a dispute or controversy as to the effect or construction of the Contsitution, upon the determination of which the result depends, and which appears in the record by a statement in legal and logical form, such as is required in good pleading. Defiance Water Co. v. Defiance, 191 U. S. 184, *ante*, 140, 24 Sup. Ct. Rep. 63, and cases cited.

The averments of this bill did not bring the case within that rule, for they put forward no existing controversy as to the effect or construc-

tion of the Constitution, on which the relief depended, and set up no right which might be defeated or sustained according to such construction."

III.

The fact that the suit is founded upon a federal statute does not raise a federal question such as would give the Circuit Court of the United States jurisdiction; but it must be shown by the pleadings of the plaintiff that there is a controversy over the construction of such statute, the determination of which would give or defeat the right of action.

In support of this proposition we refer the court to the case of Spencer vs. Duplan Silk Co., 191 U. S. 530 (48 L. ed. 290), wherein the court say:

"In the present case it is contended that the jurisdiction was not dependent entirely on the opposite parties to the suit being citizens of different states, because the suit arose under the laws of the United States, and that, therefore, jurisdiction rested also on that ground. But a suit does not so arise unless it really and substantially involves a dispute or controversy as to the effect or construction of the Constitution, or validity or construction of the laws or treaties of the United States, upon the determination of which the result depends, and which appears in

the record by plaintiff's pleading. Arbuckle v. Blackburn, 191 U. S. 406, ante, 239, 24 Sup. Ct. Rep. 148; Western U. Teleg. Co. v. Ann Arbor R. Co. 178 U. S. 239, 44 L. ed. 1052, 20 Sup. Ct. Rep. 867; Muse v. Arlington Hotel Co. 168 U. S. 430, 42 L. ed. 531, 18 Sup. Ct. Rep. 109.

Plaintiff's declaration set forth no matter raising any controversy under the Constitution, laws, or treaties of the United States."

The same doctrine is laid down in Bankers Mut. Casulty Co. vs. Minneapolis, etc. R. R. Co., 192 U. S. 380 (48 L. ed. 488), as follows:

"If the jurisdiction of the circuit court depended entirely on diversity of citizenship, the judgment of the circuit court of appeals was made final by the act of March 3, 1891 (26 Stat. at L. 828, Ch. 517, U. S. Comp. Stat. 1901, p. 550), and this writ of error must be dismissed. But it is contended that jurisdiction also rested on the ground that the case arose under he Constitution or laws of the United States, and that must be tested by the settled rule that a suit does not so arise unless it really and substantially involves a dispute or controversy as to the effect or construction of the Constitution or some law or treaty of the United States, upon the determination of which the result depends, and which appears on the record by plaintiff's own statement of the case in legal and logical form,

such as is required in good pleading. Tennessee v. Union & Planters Bank, 152 U. S. 454, 38 L. ed. 511, 14 Sup. Ct. Rep. 654; Arbuckle vs. Blackburn 191 U. S. 405, ante 239, 24 Sup. Ct. Rep. 148; Defiance Water Co. v. Defiance, 191 U. S. 184, ante, 140, 24 Sup. Ct. Rep. 63; Little York Gold-Washing & Water Co. v. Keyes, 96 U. S. 199, 24 L. ed. 656; Starin v. New York, 115 U. S. 248, 29 L. ed. 388, 6 Sup. Ct. Rep. 28."

See to the same effect:

Bagley vs. General Fire Extinguisher Co., 212 U. S. 478 (53 L. ed. 610.)

In the Law Edition reporting this case, a great many authorities are quoted in the notes. We deem it unnecessary to burden the court further on this point.

We respectfuly submit that this court is without jurisdiction, and that this cause should be dismissed.

If the court should retain jurisdiction, then we submit that the question upon which jurisdiction depends is so frivolous that this cause should be affirm- without further argument.

We will review, briefly, the question upon which plaintiff in error undertakes to predicate jurisdiction. For the sake of clearness, we will continue to number our propositions consecutively.

IV.

Sallie C. Wulf being the sole beneficiary of whatever might be recovered in the suit,

could maintain the same in her own behalf without the intervention of a personal representative. The United States courts look to the real rather than the nominal party.

Sec. 1, Ch. 149 of the Act of April 22, 1908, known as the "Employers' Liability Act" is as follows:

> "That every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories or between the District of Columbia or any of the states or territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or in case of the death of such employee, to his or personal representative, for the benefit of the surviving widow or husband and children of such employee; and if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insuficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

Sallie C. Wulf was the sole beneficiary of whatever might be recovered in the suit; the same could not be used as assets of the estate of the decedent. If the personal representative had collected it, he would have been required by the court to deliver it immediately to Sallie C. Wulf; yet, plaintiff in error is contending that plaintiff could not maintain the suit in her individual capacity simply because the statute provides that the right of action accrued to the personal representative of the deceased *for the benefit of* the plaintiff. This contention demands a very restricted interpretation of the statute. In fact, it seems to us to be frivolous.

This statute was enacted for the benefit of employes and should be construed liberally in order to give it effect. See:

United States vs. K. C. S. Ry. Co., 189 Fed. 471.
Narramore vs. Cleveland etc. Ry. 96 Fed. 298.
Caspar vs. Lewin, 109 Pac. (Kans.) 667.
Walsh vs. Whiteley L. R. 21 Q. B. Div. 371.

The latter an English case tersely states the doctrine as follows:

> "The title of the Employers' Liability Act of 1880 itself indicates that it was passed in favor of the workmen. Its object clearly was to alter the law in favor of the workman and to extend the liabilities of masters. Since the passing of the statute it seems to me that the conflict of views which existed previously has still been in

operation. Some judges have construed the act as narrowly as possible, with a view to preventing what they conceived to be injustice to masters. Other judges have considered that the act, having been passed to extend the liabilities of masters in favor of workmen, ought to be construed liberally in favor of the workmen. I myself have always belonged to the latter school."

A leading case on the point that the United States Courts look to the real rather than the nominal party, is that of Stewart vs. B. & O. Ry. Co. 168 U. S. 445 (42 L. ed. 537.)

That was a suit filed in the District of Columbia to recover damages for a death inflicted within the State of Maryland. There was a statute in force in the District of Columbia authorizing an action for wrongful death inflicted within the limits of the District and providing that the action should be brought in the name of the personal representative of the deceased within one year after death, and restricting the recovery to $10,000.00. It also provided that the damages recovered should not be appropriated to debts of the deceased, but inure to the benefit of his family to be distributed according to the laws of descent and distribution.

The state of Maryland also has a statute authorizing an action for wrongful death, providing that the suit should be brought in the name of the State of Maryland for the benefit of the wife, husband, par-

ent and child of the deceased, the same to be apportioned among the beneficiaries according to the verdict of the jury, and the suit to be commenced within twelve calendar months after the death of the deceased.

A demurrer was sustained to the declaration, and the court of appeals of the District of Columbia affirmed the case on the ground that the action could not be maintained under the statutes of the District of Columbia, because said statutes authorized recovery only in case the injury causing death is done within the limits of the district court under the Maryland statutes because of the peculiar form of remedy prescribed therein.

Mr. Justice Brewer of the Supreme Court, in rendering the opinion, says:

> "Notwithstanding the ability with which the arguments in support of this conclusion are presented in the opinion of the Court of Appeals, we are unable to concur therein. A negligent act causing death is in itself a tort, and, were it not for the rule founded on the maxim *actio personalis moritur cum persona,* damages therefor could have been recovered in an action at common law. The case differs in this important feature from those in which a penalty is imposed for an act in itself not wrongful, in which a purely statutory delict is created. The purpose of the several statutes passed in the states,

in more or less conformity to what is known as Lord Campbells' act, is to nature a tort. Such statutes are not penal, but remedial for the benefit of the persons injured by the death. An action to recover damages for a tort is not local but transitory, and can as a general rule be maintained wherever the wrongdoer can be found. Dennick v. Central Railroad Co., 103 U. S. (26 L. ed. 439). It may be well that where a purely statutory right is created the special remedy provided by the statute for the enforcement of that right may be pursued, but where the statute simply takes away a common-law obstacle to a recovery for an admitted tort it would seem not unreasonable to hold that an action for that tort can be maintained in any state in which that common-law obstacle has been removed. At least it has been held by this court in repeated cases that an action for such a tort can be maintained 'where the statute of the state in which the cause of action arose is not in substance inconsistent with the statutes or public policy of the state in which the right of action is sought to be enforced.' Texas & Pacific Ry. Co. v. Cox, 145, U. S. 593, 605, (36. L. ed. 829, 833.) See also Dennick v. Central Railroad Company, 103 U. S. 11 (26 L. ed. 439) ; Huntington v. Attirll, 146 U. S. 657 (36 L. ed. 1123) ; Northern Pacific R. R. Co. v. Babcock, 154 U. S. 190 (38 L. ed. 958.)

ent and child of the deceased, the same to be apportioned among the beneficiaries according to the verdict of the jury, and the suit to be commenced within twelve calendar months after the death of the deceased.

A demurrer was sustained to the declaration, and the court of appeals of the District of Columbia affirmed the case on the ground that the action could not be maintained under the statutes of the District of Columbia, because said statutes authorized recovery only in case the injury causing death is done within the limits of the district court under the Maryland statutes because of the peculiar form of remedy prescribed therein.

Mr. Justice Brewer of the Supreme Court, in rendering the opinion, says:

> "Notwithstanding the ability with which the arguments in support of this conclusion are presented in the opinion of the Court of Appeals, we are unable to concur therein. A negligent act causing death is in itself a tort, and, were it not for the rule founded on the maxim *actio personalis moritur cum persona,* damages therefor could have been recovered in an action at common law. The case differs in this important feature from those in which a penalty is imposed for an act in itself not wrongful, in which a purely statutory delict is created. The purpose of the several statutes passed in the states,

in more or less conformity to what is known as Lord Campbells' act, is to nature a tort. Such statutes are not penal, but remedial for the benefit of the persons injured by the death. An action to recover damages for a tort is not local but transitory, and can as a general rule be maintained wherever the wrongdoer can be found. Dennick v. Central Railroad Co., 103 U. S. (26 L. ed. 439). It may be well that where a purely statutory right is created the special remedy provided by the statute for the enforcement of that right may be pursued, but where the statute simply takes away a common-law obstacle to a recovery for an admitted tort it would seem not unreasonable to hold that an action for that tort can be maintained in any state in which that common-law obstacle has been removed. At least it has been held by this court in repeated cases that an action for such a tort can be maintained 'where the statute of the state in which the cause of action arose is not in substance inconsistent with the statutes or public policy of the state in which the right of action is sought to be enforced.' Texas & Pacific Ry. Co. v. Cox, 145, U. S. 593, 605, (36. L. ed. 829, 833.) See also Dennick v. Central Railroad Company, 103 U. S. 11 (26 L. ed. 439); Huntington v. Attirll, 146 U. S. 657 (36 L. ed. 1123); Northern Pacific R. R. Co. v. Babcock, 154 U. S. 190 (38 L. ed. 958.)

What are the differences between the two statutes? As heretofore noticed, the substantial purpose of these various statutes is to do away with the obstacle to a recovery caused by the death of the party injured. Both statutes in the case at bar disclose that purpose. By each the death of the party injured ceases to relieve the wrongdoer from liability for damages caused by the death, and this is its main purpose and effect. The two statutes differ as to the party in whose name the suit is to be brought. In Maryland, the plaintiff is the state; in this District the personal representative of the deceased. But neither the state in the one case nor the personal representative in the other has any pecuniary interest in the recovery. Each is simply a nominal plaintiff. While in the District the nominal plaintiff is the personal representative of the deceased, the damages recovered do not become part of the assets of the estate, or liable for the lebts of the deceased, but are distributed among certain of his heirs. By neither statute is there any thought of increasing the volume of the deceased's estate, but in each it is the award to certain prescribed heirs of the damages resulting to them from the taking away of their relative.

For the purpose of jurisdiction in the Federal Courts regard is had to the real rather than the nominal party. Brown v. Strode, 9 U. S. 5

Cranch 303 (3 L. ed. 108); M'Nutt v. Bland, 43 U. S. 2 How. 9 (11 L. ed. 159); State of Maryland for use of Markley v. Baldwin, 112 U. S. 490 (28 L. ed. 822.) See also Gaither v. Farmers & Mechanics Bank of Georgetown, 26 U. S. 1 Pet. 37, 42 (7 L. ed. 43, 45), in which the issue submitted to the jury was, as stated, one between the bank to the use of Thomas Corcorran, plaintiff, and Gaither, the defendant, upon which the court said: 'This practice is familiar with the Maryland courts, and when the action originates in that form, the *cestui que* use is regarded as the real party to the suit.' It is true those were actions on contract, and this is an action for a tort, but still in such an action it is evident that the real in interest is not the nominal plaintiff but the party for whose benefit the recovery is sought; and the courts of either jurisdiction will see that the damages awarded pass to such party.

Another difference is that by the Maryland statute the jury trying the cause apportion the damages awarded between the parties for whose benefit the action is brought, while by the statute of the District the distribution is made according to the ordinary laws of distribution of a decedents' estate. But by each the important matter is the award of damages, and the manner of distribution is a minor consideration. Besides, in determining the amount of the recovery the jury

must necessarily consider the damages which each beneficiary has sustained by reason of the death. By neither statute is a fixed sum to be given as a penalty for the wrong, but in each the question is the amount of damages. It is true that the beneficiaries of such an action may not in every case be exactly the same under each statute, but the principal beneficiaries under each are the near relatives, those most likely to be dependent on the party killed, and the remote relatives can seldom, if ever, be regarded as suffering loss from the death.

We cannot think that these differences are sufficient to render the statute of Maryland in substance inconsistent with the statute or public policy of the District of Columbia, and so, within the rule heretofore announced in this court, it must be held that the plaintiff was entitled to maintain this action in the courts of the District for the benefit of the persons designated in the statute of Maryland. The judgment will be reversed, and the cause remanded for a trial upon the merits."

See, also:

Van Doren vs. Pa. Ry. Co., 93 Fed. 261.

McDonald vs. Nebraska, 101 Fed. 171.

Viscount, etc. vs. S. P. Co. 176 Fed. 843.

Chapman vs. Barney, 129 U. S. 677 (32 L. ed. 800.)

any vs. Lundberg, 121 U. S. 431 (30 Law Ed. 984.)

The court will remember that plaintiff in error made no objection to the fact that defendant in error had filed this suit in her individual capacity until more than two years had elapsed after the death of deceased. On the day that plaintiff in error raised the question that defendant in error could not sue in her individual capacity, she immediately made herself party as personal representative, with the consent of the court.

As said before, she was the sole beneficiary. Only one judgment could be obtained against the plaintiff in error; it had the same amount to pay, whether suit was prosecuted by the beneficiary or the personal representative. It has been deprived of no right, and has suffered no injury by reason of the parties plaintiff in this suit, or the action of the trial court with reference thereto.

V.

The trial Court was authorized to permit the defendant in error to make herself party plaintiff as administratrix, and the same was not the beginning of a new cause of action, but related back to the beginning of the suit, therefore the Court properly overruled the demurrer setting up limitation.

In referrence to amendments, Sec. 954 of the U. S. Revised Statutes is as follows:

"No summons, writ, declaration, return, process, judgment or other proceedings in civil causes, in any court of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect, or want of form, except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form, other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions, as it shall, in its discretion and by its rules, prescribe."

The case of McDonald v. Nebraska, 101 Fed. 171, is by the Circuit Court of Appeals of the Eighth Circuit. We quote at length from it because of the collation of authorities for the holding therein set forth, and for the sound reasoning of the opinion itself. It was a suit by the State of Nebraska to recover money from a bank where State funds had been deposited. The suit was originally brought in the name of the Treasurer of the State of Nebraska, and the State asked that it be substituted as the party plaintiff, to comply with a statute of the State of Nebraska,

which application was granted. Judge Caldwell, after reciting the fact that such a substitution was authorized by the statutes and decisions of the State of Nebraska, proceeds as follows:

> "But independent of the Nebraska Code and the decisions of the Supreme Court of that State, we would have no difficulty in upholding the judgment of the lower court in this case both upon principal and authority. The right and duty of the Federal courts to allow amendments does not rest on state statutes only. It is conferred on them by the Judiciary Act of 1789. That act was framed by the great statesmen and lawyers who had actively participated in the struggle to establish the political independence of their country. When this struggle had been achieved, and the constitution adopted, they framed an act for the organization and government of the national courts, which has remained for more than a century a monument to their great wisdom, foresight, and sense of justice. The thirty-second section of that act was designed to free the administration of justice in the Federal courts from all subtle, artificial and technical rules and modes of proceeding in any way calculated to hinder and delay the determination of causes in those courts upon their very merits. This act emancipated the judicial department of the government from the shackles

of artificial and technical rules, which had heretofore been interposed to obstruct the administration of justice, as completely as the Revolution had emancipated the political department of the government from foreign domination. This was done by investing the Federal courts with plenary power to remove by amendment all such impediments to the attainment of justice. From the first, the Supreme Court of the United States grasped the object and purpose of this enactment. In referring to this section of the Judiciary Act, the Supreme Court of the United States, speaking by Mr. Justice Story, said:

'The authority to allow such amendments is very broadly given to the courts of the United States by the thirty-second section of the Judiciary Act of 1789, C. 20 (now Section 954, Rev. St. U. S.) and quite as broadly, to say the least, as it is possessed by any other courts in England or America, and it is upheld on principles of the soundest protective policy.' Matheson's Adm'rs. v. Grant's Adm'r., 2 How. 263, 281, 11 L. Ed. 261.

And Mr. Justice Miller, speaking from the Circuit bench, declared:

'This section makes more liberal provision for the amendment of process, pleadings, and all proceedings in the Federal Courts, than any of the modern codes. It is founded on common sense and justice, and ought to be regarded by

the Circuit Court as mandatory.'

Under Section 954 of the Revised Statutes, the right of amendment extends to the 'summons, writ, declaration, return, judgment and other proceedings in civil causes in any court of the United States', and may be exercised at any stage of the case, even after trial and judgment. The extended and beneficient use made of the authority given by this section to make amendments is disclosed by a long line of decisions of the Supreme Court of the United States covering every step in a case from the summons to the verdict and judgment. The Caroline v. U. S. 7 Cranch, 496, 3 L. Ed. 417; Jackson v. Ashton, 10 Pet. 480, 8 L. ed. 898; Garland v. Davis, 4 How. 131, 11 L. Ed. 907; Stockton v. Bishop, 4 How. 155, 11 L. Ed. 918; Conrad v. Griffey 11 How. 480, 14 L. Ed. 835; Parks v. Turner, 12 How. 39, 13 L. Ed. 883; Tilton v. Cofield, 93 U. S. 163, 23 L. Ed. 858; Bamberger v. Terry, 103 U. S. 40, 26 L. Ed. 317; Dow v. Humbert, 91 U. S. 294-297, 23 L. Ed. 368; Construction Co., v. Seymour, 91 U. S. 646-655, 23 L. Ed. 341; Hardin v. Boyd, 113 U. S. 765, 5 Sup. Ct. 771, 28 L. Ed. 1141; Railroad Co. v. Cox, 145 U. S. 593, 12 Sup. Ct. 905, 36 Law Ed. 829. Other United States courts have given their sanction to the most liberal exercise of this power. Erstein v. Rothchild (C. C.), 22 Fed. 61 (the opinion is by Mr. Justice Matthews); Bowden v. Burn-

ham, 19 U. S. App. 448, 8 C. C. A. 248, 59 Fed. 725; Smith v. Railway Co. 12 U. S. App. 426, 5 C. C. A. 557, 56 Fed. 458; Carmegie, Phipps & Co. v. Hulbert, 36 U. S. App. 81.97, 16 C. C. A. 498, 70 Fed. 209; People's Savings Bank & Trust Co. v. Batchelder Egg-Case Co. 4 U. S. App. 603, 2 C. C. A. 126, 51 Fed. 130; Tiernan v. Woodruff, 5 McLean 135, Fed. Cas. No. 14, 027; Swatzel v. Arnold, 1 Woolw, 383, Fed. Cas. No. 12, 682.

A defendant has an undoubted right to insist that the person entitled to recover on a cause of action set forth in a petition shall be brought on the record as the plantiff in action, to the end that he shall not be compelled to respond twice to the same demand; and that the one suit shall bar all others for the same cause of action. But it has come to be the settled law that where, either by mistake of law or fact, a suit is brought in the name of a wrong party, the real party in interest entitled to sue upon the cause of action declared on, may be substituted plaintiff, and the defendant derives no benefit whatever from such mistake; but the substitution of the name of the proper plaintiff has relation to the commencement of the suit, and the same legal effect as if the suit had been originally commenced in the name of the proper plaintiff. The name of the proper plaintiff may be brought

on the record at any time during the progress of the cause, and may even be inserted after verdict and judgment. When a wrong party has been named as plaintiff, the action will never be dismissed, and the proper plaintiff required to bring a new action, when the effect would be to let in the bar of the statute of limitations. An action was brought in the name of one member of a firm upon a cause of action belonging to the firm, and it was held in Dixon v. Dixon 19, Iowa 512, that the court below erred in not permitting an amendment substituting the firm as plaintiffs in the action. The court said:

'The jury found that the defendant justly owed the money; but, in the opinion of the court below, the technical right to recover was not in the plaintiff, and thereupon the plaintiff, being interested, sought to amend, by adding the name of his partner, or firm name, and thus bring his right to recover within technical law as well as rest it upon broad justice. There is one fact of controlling influence in the determination of this case, and that is, it appears from the papers in the case that, unless the plaintiff is permitted to amend, and continue the prosecution of the claim in this suit, it will be barred by the statute of limitations. The jury found that the defendant justly owes the claim, and to permit the plaintiff to amend and recover such just

claim will be more evidently in the furtherance of justice than to refuse the amendment and dismiss the action, as did the court below, and thereby defeat the recovery of a claim the justice of which as already been established.'

This ruling was reaffirmed by the court in the case of Hodges v. Kimball, 49 Iowa 577.

In Insurance Co. v. Mueller, 77 Ill. 22, it was held that when an administrator sued upon a policy of insurance the widow and heirs of the assured might be substituted as plaintiffs in the action.

In Lake Erie & W. R. Co. v. Town of Boswell (Ind. Sup.) 36 N. E. 1103, the court permitted the substitution of the town of Boswell as plaintiff in lieu of the trustees of the town.

In Wood v. Circuit Judge, 84 Mich. 521, 47 N. W. 1103, in a suit upon an insurance policy, the heirs of the deceased were substituted for the administrator of the assured.

In McLewis v. Ferguson, 59 Ga. 644, the action was erroneously brought and prosecuted to judgment in the name of the sheriff as plaintiff. The Supreme Court, Chief Justice Bleckley delivering the opinion, held the sheriff a mere nominal party, 'a stranger in a strange land', and directed the name of the sheriff to be stricken out as plaintiff, and that of the real party in interest substituted and affirmed the judgment

of the lower court. Other cases in that state are to the same effect. Wilson v. Presbyterian Church, 56 Ga. 554; Childers v. Adams, 42 Ga. 352.

In Miller v. Pollock, 99 Pa. St. 202, the action was brought by one having no interest in the cause of action, and the court allowed an amendment substituting the real party in interest as plaintiff. The court said: 'Our statutes of amendments have been liberally construed, and it has been repeatedly held that parties might be stricken out or added whenever, by so doing, the case can be tried on its merits; and the right to so amend is not confined to a mere mistake of fact in the name of the party. As is said in Com. v. Dillon, 81 Pa. St. 44: "An action may be commenced in the name of a wrong party by mistake of law, and the Legislature meant the power of amendment to extend to that case.' "

In Whitaker v. Pope 2 Woods, 463, Fed Cas No. 17, 528, Mr. Justice Bradley, on the Circuit, after judgment, and on a motion in arrest of judgment, ordered the name of the plaintiff, who had no legal or equitable interest in the cause of action, to be stricken out of the record, and the name of the real party in interest to be inserted.

Where an administrator sold a claim to the

estate, and afterwards brought suit thereon in his own name as administrator, the Supreme Judicial Court of Massachusetts held that the purchaser of the claim might be substituted as the plaintiff in the action, although he was not the owner of the claim at the time the suit was instituted by the administrator. Buckland v. Green, 133 Mass. 421.

In McCall v. Lee (Ill. Sup.) 11 N. E. 522, the suit was originally brought in the name of Thomas McKee, as administrator of a decedent's estate. In the progress of the case it was determined by the Supreme Court that Henry R. Lee, and Not McKee as administrator, was the proper party to maintain the suit, and thereupon the lower court permitted the declaration to be amended by substituting the name of Lee as plaintiff for that of McKee as administrator. This action of the lower court was assigned as error. The Supreme Court, in disposing of the assignment, said:

'In People vs. Abbott, supra, this court intimated that the real party in interesf in the prosecution of the claim was Henry R. Lee, the appellee herein, and not Thomas McKee, administrator. Accordingly, after the cause was reinstated, the county court, upon application for that purpose, and after due notice, permitted an amendment to be made, substituting the name

of appellee as plaintiff in the place of that of McKee, administrator. It is charged that this amendment was improper; that its allowance amounted to the filing of a new claim by a new party, after the two years' limit for the filing of the claims had expired; and that, therefore, the circuit court erred in directing the judgment in appellee's favor to be paid out of the assets of the estate, in due course of administration, instead of directing it to be paid out of subsequently discovered or non-inventoried assets. In this case the amendment did not make a new cause of action. * * * After the substitution of appellee's name, the claim was still for the same notes and property. April 11, 1881, the day on which it new cause of action is introduced, courts will alnewcase of action is introduced, courts will allow amendments liberally for the purpose of avoiding the running of the statute. We think that the amendment was properly allowed on the authority of the following cases: McDowell v. Town, 90 Ill. 359; Insurance Co. v. Mueller, 77 Ill. 22; Coal Co. v. Taylor, 81 Ill. 590; Challenor v. Niles, 78 Ill. 78.'

In Massachusetts, a suit in equity was brought by a receiver of a corporation, who was not, under the rule which obtains in that state, authorized to maintain it, and the Supreme Judicial Court of Massachusetts held that the bill

might be amended by substituting for the name of the receiver the name of the corporation of which he was receiver, and cited the following cases: Buckland v. Green, 133 Mass. 421; Costello v. Crowell, 134 Mass. 280; Pierce v. Insurance Co., 138 Mass. 151; Bank v. Stevenson, 7 Allen 489; Byers v. Coal Co., 106 Mass. 131; Wilson v. Welch (Mass.) 31 N. E. 712.

In Morford v. Diffenbacker, 20 N. W. 600, the Supreme Court of Michigan, Chief Justice Cooley delivering the opinion of the court, said:

'Defendant contends that the court had no power to permit an amendment of the declaration which substitued one party plaintiff for another. This, it is said, made a new suit of it. * * * This contention is plausible, but, we think, not sound.'

In Lottman v. Barnett, 62 Mo. 159, the Supreme Court said:

'Amendments are allowed expressly to save the cause from the statute of limitations, and courts have been liberal in allowing them when the cause of action is not totally different.'

In George v. Reed, 101 Mass. 378, the Supreme Judicial Court, speaking by Chief Justice Chapman, said:

'The same remark may be made as to the point that the amendment has the effect to repeal the statute of limitations. It is true that,

if the amendment had been refused, and the plaintiffs had been compelled to become non-suit, and commence a new action, the statute of limitations might be a bar to it. But that fact furnishes no argument against the amendment. In Davenport v. Holland, 2 Cush. 1, an amendment to a petition for review was granted more than a year after final judgment, when a new petition would have been barred by the statute. The amendment was held to be proper. Shaw, C. J., said that it had often been held to be a good reason for granting amendments on terms, instead of non-suiting a party, and compelling him to bring a new action, that such action would be barred by the statute of limitations. He also said that the provisions of law allowing amendments are highly remedial, and are construed most liberally to cancel error and mistake and to advance justice and right.'

The doctrine of this case is reaffirmed by the same court in Sanger v. Newton, 134 Mass. 308, where it is said:

'The fact that the three years within which an original petition could have been filed have elapsed furnishes no ground for refusing the amendment, but rather a reason why it should be allowed as otherwise substantial justice will be defeated.'

In Van Doren v. Railroad Co., 35 C. C. A.

name of Laura L. Van Doran, as administrix name of Laura L. Can Dorafn, as administrator of her deceased husband, and subsequently, and after the statute of limitation had run against a suit in her name as widow, she applied to the court for leave to amend the declaration, by declaring as widow instead of administratrix of her deceased husband. The lower court refused to allow the amendment, but this ruling was reversed by the Circuit Court of Appeals, that court saying:

'Substantial justice requires that such an amendment should be allowed, as a second suit for damages for the death of Henry Van Doren would be barred by the one-year limitation in the Pennsylvania statute.'

The court has twice decided that the amendment of a petition has relation to the commencement of the action, and leaves no interval for the statute of limitations to intervene. Bowden v. Burnham, 59 Fed. 752, 8 C. C. A. 248, 19 U. S. App. 448; Carnegie, Phipps & Co. v. Hulbert, 70 Fed. 202, 16 C. C. A. 498, 36 U. S. App. 81.

Morever, it is a grave question whether it is competent for the receiver to plead the statute of limitations in a suit upon a claim which was not barred when the comptroller appointed the receiver. The receiver is appointed to collect the assets and pay the debts of the insolvent bank

for this purpose. The anology is very close, if not complete, between a receiver of a national bank appointed by the comptroller of the currency under the act of congress and an asignee in bankruptcy or an assignee of an insolvent debtor s estate; and it seems to be well settled that such asignees or trustees cannot plead the statute of limitations unless the debt was barred when the trust was created. * * *

There are in the history of the jurisprudence of every country certain epochs which mark the beginning of distinct trains of legal ideas and judicial conceptions of justice. There was a time in England and in this country when the fundamental principles of right and justice which courts were created to uphold and enforce were esteemed of minor importance compared to the quibbles, refinements and technicalities of special pleading. In that period the great fundamentals of the law seemed little, and the trifling things great. The courts were not concerned with the merits of a case, but with the mode of stating it. And they adopted so many subtile, artificial and technical rules governing the statement of actions, defences for the entire system of special pleading was built up by the judge without the sanction of any written law—that in many cases the whole contention was

whether these rules had been observed, and the merits of the case were never reached, and frequently never thought of. Happily for mankind , and for the law itself, that epoch is past in England and this country, and we now have an epoch in which substance is more considered than form, in which the justice and right of the cause determines its decisions, and not some technical error or mistake in the pleadings. In England today the amendment complained of in this case would be allowed quite as a matter of course, and the suggestion that the defendant had gained some advantage by the mistake would not be entertained for a moment. There, as here every error or mistake in the pleadings which does not affect the substantial rights of the adverse party may be cured by amendment; and what is meant by a substantial right is a right going to the actual merits of the case. Such a right is not acquired by mistake or error in the pleadings which has not misled the other party to his prejudice. And the prejudice must be actual and irreparable, and not merely theroretical. At this day the party who seeks to profit by an error or mistake in pleading must be able to invoke the principle upon which the law of estoppel is founded. And the emotion of surprise, once so assiduously cultivated by lawyers, has lost its virtue. Extreme sensitiveness to that emotion no longer

avails to turn a suitor out of court or delay justice.

Other errors assigned have been carefully examined, and found to be entirely without merit. As they are of no general importance a more particular reference to them is unnecessary. The judgment of the Circuit Court is affirmed."

Again, Sec. 914 of the United States Statutes provides:

"The practice, pleadings and forms and modes of proceedings in civil causes other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice pleadings and forms and modes of proceedings existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, any rule of the court to the contrary notwithstanding."

The cause was tried in Texas, and the Texas statute in reference to parties who could bring suit in case of wrongful death that was in force at the time suit was filed was as follows:

R. S. Art. 3022—"The action (for death) may be brought by all the parties entitled thereto, or by any one or more of them for the benefit of all."

The statute of the state of Texas in force at the time of the amendment of the pleadings making defendane in error party plaintiff as personal representative, was as follows:

"Providing in case of death of such employe

the action may be brought without administration by all the parties entitled thereto; or by any one or more of them for the benefit of all.' (Acts 1909, p. 279)

We will now briefly review a few of the Texas Supreme Court decisions on the proposition that the substitution of the proper party plaintiff is not the beginning of a new suit but takes effect as of the date of the filing of the suit.

In the case of Price v. Wiley, 19 Tex. 143, the court say:

> "The plaintiff in an action on a promissory note may allege, by way of amendment, that he is merely an agent for another, and such other may in the same amendment, become a party to the suit; such proceeding is not properly the making of a new party; but if it were so regarded, the defendant could not object, unless he were thereby deprived of some substantial defence."

In the case of Martel v. Somers, 26 Tex. 551, the court holds that where a suit is brought in the name of the nominal plaintiff for the use of another person the substitution by amendment of the real party does not make a new party to the cause of action.

In the case of Hudson v. Morris, 55 Tex. 604, the same doctrine is advanced, as follows:

> "In every stage of judicial proceeding in a

suit, from its institution on, through every stage, down to the final extinction or satisfaction of the judgment, it is to be seen from the quotations and citations which have been made, that the party who is beneficially interested is permitted to act in his own behalf to enforce his right, although the proceedings may have been had in the name of another party who appears to have the legal right, and to be the ostensible owner of the interest involved.'

See, also to the same effect:

Babb vs. Rogers, 67 Tex. 339.

Connolly vs. Hammond, 51 Tex. 647.

Killebrew v. Stockdale, 51 Tex. 531.

Tarkington v. Broussard, 51 Tex. 554.

Scoby v. Sweatt, 28 Tex. 713.

Beckton vs. Alexander, 27 Tex. 659.

Thouvenin v. Lea, 26 Tex. 614.

Ry. v. Davidson, 68 Tex. 370.

VI.

The Plaintiff in Error having filed its answer to the merits without objecting to the parties plaintiff thereby waived all questions of parties plaintiff, and admitted the right of plaintiff to sue in the capacity in which she did sue.

The Texas Revised Statute which governed as to the rules of pleadings in said cause is as follows:

"Art. 1265. An answer setting up any of the

following matters, unless the truth of the pleadings appear of record, shall be verified by affidavit;

2—That the plaintiff has not legal capacity to sue.

5—That there is a defect of parties, plaintiff or defendant."

There is not only no pleading on the part of plaintiff in error under oath objecting to parties plaintiff in the suit, but on the contrary, the record shows that this suit was filed on January 23rd., 1909 (Rec. 1); that the plaintiff in error filed an answer consisting of a general exception, general denial and special plea of contributory negligence and assumed risk, on May 19, 1909. (Rec. 4); and on January 6, 1911, more than two years after the death of the deceased, filed its amended answer setting up by demurrer the want of proper parties plaintiff. The filing of the first original answer waived defects of parties.

Carey v. Brown, 92 U. S. 171; 23 L. Ed. 469.
Greenleaf v. Queen, 1 Pet. 138; 7 L. Ed. 85.
Connor v. Hawkins, 64 Tex. 545.
State v. Goodnight, 70 Tex. 688.
Tyron v. Butler, 9 Tex. 553.
Blum v. Strong, 71 Tex. 329.

31 Cyc. 172, states the proposition broadly that: "A plea to the merits admits plaintiff's capacity to sue."

IN CONCLUSION.

It is not contended in this case that the plaintiff in error was not liable for the death of the deceased, nor that the defendant in error was not entitled to the amount recovered as sole beneficiary of the deceased. The sole contention of the plaintiff in error is that the trial court erred in reference to its action as to parties plaintiff. It invokes the jurisdiction of this court solely upon the proposition that the construction of the Federal Employers' Liability Act is involved in determining whether or not the trial court erred in permitting defendant in error to make herself party plaintiff as personal representative after the plaintiff in error had objected to her prosecuting the suit in her individual capacity. An issue brought into the suit by plaintiff in error.

We respectfully submit this contention is frivolous, and that this cause, if not dismissed for want of jurisdiction, should be affirmed without waiting for further argument on the merits.

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